In the

Supreme Court of the United States

October Term, 1976

No. 76-717

NELSON BUNKER HUNT AND WILLIAM HERBERT HUNT,

Petitioners,

v.

PAN AMERICAN ENERGY, INC., a North Dakota corporation, MOBIL OIL CORPORATION, a New York corporation, and MELVIN ("Pat") BALLANTYNE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Petitioners, Nelson Bunker Hunt and William Herbert Hunt, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 2, 1976.

OPINION BELOW

The opinion of the Court of Appeals, Nelson Bunker Hunt and William Herbert Hunt v. Pan American Energy, Inc., Melvin ("Pat") Ballantyne and Mobil Oil Corporation,

540 F.2d 894 (8th Cir. 1976) appears in the Appendix at 75. The Memorandum of Decision and Order entered by the District Court for the District of North Dakota, Southwestern Division, dismissing Petitioners' complaint appears in the Appendix at 27.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 2, 1976. A timely petition for rehearing and suggested rehearing en banc was denied on August 24, 1976, Appendix at 108, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether in a tort case involving misappropriation of trade secrets, the courts below imposed upon Petitioners an improper burden of proof.

2. Whether the court of appeals erred in failing to remand the case to the trial court for new trial after finding the trial court findings clearly erroneous on two threshold issues.

STATEMENT OF THE CASE

The Petitioners, William Herbert Hunt and Nelson Bunker Hunt ("the Hunts"), both residents of Texas, commenced their action against Melvin "Pat" Ballantyne ("Ballantyne"), Pan American Energy, Inc. ("Pan Am"), and Mobil Oil Corporation ("Mobil") by filing a Complaint (Appendix at 1) in the United States District Court for the District of North Dakota on October 17, 1973. Federal court jurisdiction was predicated on 28 U.S.C. § 1332, diversity of citizenship. The Hunts' case against Ballantyne and Pan Am was premised on the tort of misappropriation of trade secrets (i.e. Hunt information regarding the location and quantity of coal deposits). The case against Mobil was based upon the fact that it had purchased coal leases from Pan Am with knowledge that the Hunts claimed an interest in these leases. Petitioners prayed for the court to

declare that Mobil held the coal leases acquired from Pan Am in trust for the Hunts and, in the alternative for damages of $5,000,000 against Ballantyne and Pan Am for the misappropriation of trade secrets.

Ballantyne and Pan Am denied that they had misappropriated any Hunt trade secrets. Mobil denied Ballantyne or Pan Am had misappropriated any of the Hunts' trade secrets, and alleged that Mobil was a bona fide purchaser and was entitled to retain coal leases purchased from Pan Am.

The trial court severed the issue of liability from the issue of damages and trial to the court, the Honorable Paul Benson, chief judge, presiding, on the issue of liability commenced on March 10, 1975. On August 18, 1975, the Court filed its Memorandum of Decision and Order that judgment be entered for the dismissal of the action. Judgment was entered dismissing the Plaintiffs' action. On September 16, 1975, the Hunts filed a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit from the trial court's Memorandum of Decision and Order and the Order Dismissing Petitioners' action.

In 1971, the Hunts began an active program to explore for coal deposits in North Dakota whereby Hunt geologists drilled and electronically logged thousands of drill holes. From the information furnished by the logs, maps were prepared delineating coal bearing formations believed to contain commercial quantities of coal. The mapped areas, which were constantly updated, were known as "buy" or "target" areas. The holes were drilled by contract drillers and logged by Hunt personnel. The person logging a hole assigned each hole a code number, consisting of an alpha-numeric designation, noted the location of the hole by legal description and by alpha-numeric notation on a map, described the samples from the hole, electronically logged the hole, cleared up the debris around the hole, and destroyed the pattern of the samples taken. The loggers then delivered the original log of the holes, with the alpha-

numeric code numbers and locations on them, to Hunt geologists for delivery to Dallas. The Hunts' landmen were sent to North Dakota to purchase coal leases in or near the buy areas.

The Hunt geologists active in the North Dakota coal exploratory program at all material times were Mark Reishus and D. A. Zimmerman. These geologists interpreted the logs and outlined the potential coal deposits on area maps. Duplicates of these maps were kept in the Williston office of Hunt Oil Company.

During the Hunts' coal exploration program, Todd Ballantyne ("Todd"), a son of Respondent Ballantyne, was employed in North Dakota from October through December, 1972, as a logger for Petitioners. In October, 1972, Ballantyne secretly embarked on his own coal leasing program under the name Pan American Energy, Inc. of Denver, Colorado, not recording the leases taken until February, 1973, sometime after Todd left the Hunts' employ.

While employed by the Hunts, Todd had access to all of their geological information and buy area maps, copies of which were kept in the Hunts' Williston office (Appendix at 85 [8th Circuit Opinion]). Todd admitted making and taking copies of the Hunts' logs, without permission. These were given to Ballantyne. In the Summer of 1973, while attempting to sell his leases to Mobil, Ballantyne furnished Mobil over 100 logs with locations noted which were identical to the ones drilled by the Hunts. A list of these locations was also furnished to Atlantic Richfield Corporation as part of Ballantyne's attempt to sell his leases.

In February of 1973, Hunt landmen reported that there was heavy competition from Pan Am for leases in many of the Hunts' "target areas." Landmen also became aware of rumors that Pan Am, a new North Dakota corporation, was receiving confidential information belonging to the Hunts. The Hunts undertook an investigation to determine

whether their confidential information was being disseminated to Pan Am. In September, 1973, after investigation, the Hunts learned that Mobil was contemplating the purchase of Pan Am's coal leases. A Hunt representative contacted Mobil and was informed that Ballantyne had furnished Mobil with geological information relative to his leases. Neither Ballantyne nor Pan Am, however, employed any geologists (Appendix at 78 [8th Circuit Opinion]) or had done any geological exploratory work. Mobil knew this. Hunt representatives requested Mobil's permission to inspect the suspect information furnished to it by Ballantyne. Mobil, without retaining any copies, returned to Ballantyne all of the information which he had furnished. Mobil then proceeded with the purchase of the leases.

Two months before trial, the Hunts learned that Mobil had in its possession a map upon which a contract geologist who worked for Mobil had plotted over 100 of the logs furnished to Mobil by Ballantyne and later taken back. Almost all of the locations plotted matched holes drilled by the Hunts. In addition, the geologist assigned to the locations indicated on the map hole numbers taken from the face of the logs furnished by Ballantyne. Some of the numbers matched the numbers given by the Hunts' geologists to the logs in the field. The others matched numbers of logs sent back to North Dakota from Dallas for coring purposes. Almost all of these holes were drilled and logged during the period of Todd's employment by the Hunts.

REASON FOR GRANTING THE WRIT

The courts below have reached a result, even on the basis of their own findings, so grotesque and so contrary to the jurisprudence of North Dakota, federal courts, and tort law generally, as to justify the supervisory intervention of this Court. In spite of the holdings by *both* courts below that:

(1) A confidential relationship with the Petitioners was breached;

(2) The Defendants, Ballantyne and Pan Am, had confidential information of Petitioners (the Court of Appeals having found more of such information than the trial court);

(3) Pan Am and its principals purchased leases in or near the areas to which such confidential information is pertinent;

(4) Pan Am delivered the wrongfully acquired information to others to whom it sought to sell the leases; and

(5) The Ballantynes, principals of Pan Am, are of questionable integrity and not worthy of belief;

the courts below dismissed this action for misappropriation of trade secrets.

This result, absurd on the face of it, was apparently caused by:

(1) A significant departure from the process mandated by the *Erie* Doctrine;

(2) The imposition of a burden of proof so difficult (if not impossible) to meet that it amounts to a deprivation of due process; and

(3) An apparent failure by the Court of Appeals to recognize that its failure to remand the case for new trial, after finding the trial court "clearly erroneous" on two material, threshold and interwoven issues, amounts to an unwarranted trial de novo in the appellate court.

The complete elimination of a remedy for a well recognized wrong in a State of these United States, not demanded or even suggested by the law of that State, as a result of the federal court opinion, demands review by this Court.

ARGUMENT AND AUTHORITIES

1. The Courts Below Applied An Improper Standard In Regard To The Burden Of Proof Which Must Be Met To Establish The Right To Damage For The Misappropriation Of Trade Secrets.

The aberrant conclusions of the courts below are a result of the imposition of a totally improper (and even impossible) burden of proof. While this case is admittedly one based upon diversity of citizenship and tried under North Dakota law, it cannot be treated simply as one in which the peculiarities of a particular state's law lead to an odd result. The conclusions of the courts below as to the burden of proof were not only *not* demanded by existing North Dakota law, but they are contrary to the standards imposed by every other federal and state court in the United States which has had occasion to litigate a similar set of facts. Accordingly, the standard of proof is a fundamental legal error which demands this Court's attention.

The gravamen of the Hunts' cause of action is the misappropriation of their confidential information by Ballantyne and Pan Am. The Hunts prayed for the imposition of a constructive trust upon the leases which were purchased by defendants after they had acquired the Hunts' confidential information. In the alternative, the Hunts requested damages in the amount of $5,000,000. (Appendix at 4 [Complaint]). The trial court bifurcated the trial of the issue of liability from the determination of a proper remedy.

The courts below imposed an improper burden upon the Hunts by requiring them to prove their cause of action for damages by the same "clear and convincing" standard required to justify the imposition of a constructive trust. The trial court specifically stated that the burden he placed upon the Hunts required them to prove their cause of action by "more than a preponderance of the evidence." (Appendix at 36 [trial court opinion]).

The courts below were guided in structuring an evidentiary standard by a North Dakota statute, NDCC 59-01-06, and cases decided thereunder. These authorities suggest the imposition of a "clear and convincing" burden of proof in a case seeking declaration of a constructive trust. *These authorities are totally irrelevant to the process of ascertaining a plaintiff's burden in a tort action for damages.*

There is no North Dakota precedent for the proposition that a plaintiff who seeks damages in a misappropriation of trade secrets case must prove his case by "clear and convincing" evidence. Thus, the courts below were "writing on a clean slate." They have left North Dakota law in a most confused state because of their refusal to act in accordance with well-settled *Erie* principles. As one federal district court has stated:

> Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 * * *, the right to recover in the cause of action for unfair competition depends on the law of Wisconsin. There is a dearth of Wisconsin cases involving liability for misappropriation of trade secrets. *However, the rules to be applied are the application of well-settled principles of tort law and we have been guided by the Restatement of the law of Torts * * * as well as decisions from other jurisdictions.* (emphasis added).

Solo Cup Co. v. Paper Machinery Corp., 240 F. Supp. 126 (E.D. Wisc. 1965). Similarly, the courts below should have been guided by the substantive tort law of North Dakota. They should have applied "well-settled principles of tort law" and they should have been influenced by well-reasoned "decisions from other jurisdictions." Nothing could be more of an anathema to well-settled principles of tort law than forcing a plaintiff to prove the elements of his claim for the misappropriation of confidential information by "clear and convincing" evidence instead of by a preponderance of the evidence.

The North Dakota law being unsettled and the trial court's determination being contrary to general tort law, the

Eighth Circuit should not have been bound by it: "We accept the view of the trial court upon doubtful questions with respect to the law of its state *unless convinced that its determination is based upon a clear misconception or misapplication of local law.*" (emphasis added). *Venn v. Goedert*, 319 F. 2d 812, 814 (8th Cir. 1963).

Petitioners should have been required to prove the existence of the elements of the tort of misappropriation of trade secrets and their entitlement to damages by a "preponderance of the evidence," 12 BUSINESS ORGANIZATIONS, MILGRIM, TRADE SECRETS § 7.07(1) at 7-46 (Matthew Bender 1976) and cases cited therein. (Appendix at 14 [Trial Brief]).

No other misappropriation of trade secrets case ever decided by a United States Circuit Court of Appeals has imposed upon a plaintiff the obligation to prove the elements of the tort and his right to damages by a standard more onerous than by a preponderance of the evidence. In *Conmar Products Corp. v. Universal Slide Fastener*, 172 F. 2d 150, 157 (2d Cir. 1949) the plaintiff alleged that the defendant had induced the plaintiff's employees to divulge trade secrets. Judge Learned Hand declared that "the plaintiff had the burden of showing that the *balance* was in its favor * * *" (emphasis added). The Court of Claims has stated, "Plaintiff, of course, has the burden of establishing, *by a preponderance of the evidence* without resort to presumptions of any kind, that he in fact was the owner of a trade secret and just what that trade secret was." *Frodge v. United States*, 180 U.S.P.Q. 583, 587 (Ct. Cl. 1974) (emphasis added). The courts of New York have applied similar standards by which the misappropriation of trade secrets must be proved. *Minnesota Mining & Manufacturing Co. v. Technical Tape Corp.*, 23 Misc. 2d 671, 192 N.Y.S. 2d 102, 112 (Sup. Ct. 1959) involved an action brought by one tape manufacturer against another for damages and injunctive relief for the defendant's misappropriation and use of the plaintiff's processing technique where the defendant al-

legedly induced the plaintiff's former employee to breach his contract by divulging trade secrets. The court wrote,

> In order to meet the burden cast upon it, it was necessary for the plaintiff to establish *by a fair preponderance of the credible evidence* that the particular trade secrets which it claimed it possessed were trade secrets in contemplation of law and that the same were misappropriated by the defendants. (emphasis added).

In *Dutch Cookie Machine Co. v. Vande Vrede*, 289 Mich. 272, 286 N.W. 612 (1930), a case involving the misappropriation of secret recipes by a former franchisee, the court required the plaintiff to establish his right to an injunction by "preponderating evidence." The burden of proof under which the Hunts were required to labor cannot be more onerous merely because they sought damages rather than an injunction. Neither can the standard of proof be more stringent simply because the Hunts prayed for the establishment of a constructive trust as an alternative remedy.

Having imposed a burden of proof impossible for any plaintiff in a case of this sort to meet (the wrongful action being necessarily secretive), the courts below apparently felt no need to carefully formulate the issues. They did not, in fact, ever define or address the true issues in this cause.

E. W. Bliss Company v. Struthers-Dunn, Inc. 408 F. 2d 1108 (8th Cir. 1969) defined the ultimate issues in a case of this sort as follows:

> The essential element of a cause of action for appropriation of a trade secret are (1) existence of a trade secret, (2) acquisition of the secret as a result of a confidential relationship, and (3) unauthorized use of the secret. 408 F. 2d at 1112.

That case also defined a "trade secret" as being "any * * * compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." 408 F. 2d at 1112. The second element stated in *Bliss* has been broadened to include any improper acquisition of the information, whether as a result of the breach of a confidential relationship or otherwise. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, (1975). Each of these elements was established at trial by a preponderance of the evidence and by the admissions of the defendants. The Hunts' case is more compelling than *Kewanee Oil* because a confidential relationship was breached by Todd.

The courts below rely heavily in their opinions on the fact that persons could have observed the Hunt drillers and loggers as they worked in the field. If this fact is of any significance whatsoever it is for its implication that the information which resulted from the Hunt exploration in North Dakota was not "secret." Both courts specifically found that confidential Hunt information was actually in Ballantyne's possession. Therefore, the courts, without considering the point, inadvertently held that North Dakota does not adhere to the doctrine of "relative secrecy." This doctrine instructs that information need not be absolutely secret to be entitled to protection from misappropriation. The Court of Appeals for the Ninth Circuit has recently held that,

> No more is required than that the information possess a qualified secrecy * * * [and] whether such a degree of secrecy existed in a particular case is a question of fact. It is not negated because defendant by an expenditure of effort might have collected the same information from sources available to the public."

Clark v. Bunker, 453 F. 2d 1006, 1009-1010 (9th Cir. 1972). Other circuit courts have found that other states would apply this doctrine as an integral part of the law of mis-

appropriation of trade secrets. In *K-2 Ski Co. v. Head Ski Co.*, 506 F. 2d 471, 473-4, (9th Cir. 1974), the court noted that

> There are two common law doctrines on secrecy: (1) absolute secrecy and (2) relative secrecy. The better view, and the one we think both Washington and Maryland would espouse, is the majority view of relative secrecy which has been adopted by the Restatement of Torts § 757.

The Court of Appeals for the Eighth Circuit should not be allowed to place its imprimatur upon a decision which determines North Dakota law without addressing this and other fundamental questions.

Further, the opinions in this case to date indicate that the plaintiff in a case such as that now under consideration must prove by clear and convincing evidence that the defendant has not only appropriated the trade secret, but has *used it intelligently*. (Appendix at 94-95, 105 [8th Cir. Opinion]) This not only established an impossible and erroneous burden of proof, but also leads to a mistaken conclusion. This view is contrary to the general law in the field of unfair competition and to business morality. "[T]he Plaintiff need not prove that the defendant used the secret in precisely the identical form in which it was disclosed to him. In this context, the 'doctrine of equivalents' applies to trade secrets as well as to patents." 2 CALMANN, THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES § 58.1 at 480 (3d Ed. 1968).

The courts below erred in holding that the Hunts' entire case failed because it had not been proven by the clear and convincing standard. The clear and convincing standard may be applicable to that part of the Hunts' case which seeks the imposition of a constructive trust upon the leases held by Pan Am and Mobil, though, in light of the dearth of North Dakota cases in point, even that is questionable. But Petitioners also alleged, and the record indicates that

they sufficiently proved, that they have been damaged by defendants' commission of the tort of misappropriation of trade secrets. For this tort the usual civil evidentiary standard of proof by a preponderance of the evidence should apply. The lower courts' opinions in the instant case stand for the proposition that a plaintiff suing for damages in the State of North Dakota who alleges the misappropriation of trade secrets must prove his case by the same evidentiary standard he might be required to meet if he sought to impose a constructive trust on the items which are the subject of the suit. This is clearly error. No North Dakota case has held that the burden of proof on a plaintiff seeking to recover damages in a tort case requires more than proof by a preponderance of the evidence.

The case at bar stands for the erroneous proposition that in North Dakota, a plaintiff in a suit for damages based upon the tort of misappropriation of trade secrets must prove, by clear and convincing evidence, that:

1. the defendant used wrongfully acquired information in an intelligent manner, and
2. what specific information was used to acquire what specific property, and
3. the defendant could not have acquired the information which he misappropriated in any other way.

This is a proposition contrary to the law in every other state and American jurisprudence . It should not be imposed upon North Dakota by the Court of Appeals for the Eighth Circuit.

A writ of certiorari should issue to that Court.

2. The Court Of Appeals Found The Trial Court Clearly Erroneous On Two Threshold Issues Of Petitioners' Case And Should Have Remanded The Case For New Trial In Light Of Such Correct Findings.

An appellate court does not try a case de novo. The Court of Appeals erred in doing so in this case. The Hunts' case was premised on the tort of misappropriation of their

trade secrets by Pan Am and Ballantyne. Much of the evidence in the Hunts' favor was circumstantial. Some was direct. The trial court made a determination that Todd did not have access to Hunts' logs and buy area maps. The court also found that Mobil's contract geologist did not have the Hunts' logs before him at the time he compiled the map from information furnished to Mobil by Ballantyne. Thereafter, the trial court took a myopic view of each piece of evidence, requiring that each element of Petitioners' cause of action be proved by the clear and convincing standard. The court failed to impose liability.

The Court of Appeals found the trial court clearly erroneous in its conclusion that Todd had only minimal opportunity to acquire Hunts' buy area maps (Appendix at 85). As to the trial court's finding that Abshire did not have Hunts' logs, the circuit court stated "Abshire must have been recording that information [well numbers] from Hunt logs." (Appendix at 103). The Court of Appeals affirmed although it found the trial court clearly erroneous on two material and threshold issues. These erroneous findings by the trial court affected its subsequent findings. The trial court believed that Ballantyne and Pan Am had no opportunity to obtain the Hunts' secret information which they were accused of misappropriating. This conclusion gave added weight to any other evidence which could have been interpreted to mean that Ballantyne and Pan Am did not have or use such secrets. Ballantyne admitted having Hunt secret information. The trial court, had it made the correct findings, may have viewed the other issues and, indeed, the entire case differently. If the trial court had found, in the first instance, as the Court of Appeals later found, that Todd did have access to confidential information, the weight given to the other evidence might very well have changed accordingly. The weight to be given all of the evidence is for the trial court. For the circuit court to affirm in light of these findings is for the court to try the case de novo on appeal.

It is the proper practice to remand a cause for hearing upon a specific issue or issues. However, when the issues

are so interwoven or where justice so requires, the whole case should be remanded for a new trial. *Gasoline Products Co. v. Champlain Refining Co.*, 283 U.S. 494 (1931). *City of St. Louis v. Western Union Telegraph Company*, 148 U.S. 380 (1983). In *Gasoline Products Co.*, this Court stated,

> Here the question of damages on the counterclaim is so interwoven with that of liability that the former can not be submitted to the jury independently of the latter without confusion and uncertainty which would amount to a denial of a fair trial.

283 U.S. at 497. This is a common sense rule which should apply in every case. Here, the issue of liability is so interwoven with that of the existence of Todd's access, the import of the Abshire map, and Ballantyne's possession of Hunt secret information, that to affirm this case is likewise a denial to the Hunts of a fair trial. The Court of Appeals has sanctioned a decision of the trial court made upon clearly erroneous findings of interwoven and threshold issues of Petitioners' case. Under such circumstances, this case should have been remanded to the trial court for new trial.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit. The opinion should be vacated, and this cause remanded to the trial court for new trial.

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IN THE

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OCTOBER TERM, 1976

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NELSON BUNKER HUNT,
AND WILLIAM HERBERT HUNT,
Petitioners

V.

PAN AMERICAN ENERGY, INC.,
a North Dakota Corporation;
MOBIL OIL CORPORATION,
a New York Corporation; and
MELVIN "PAT" BALLANTYNE,
Respondents

* * *

APPENDIX

To The Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Eighth Circuit

* * *

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IN THE

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF NORTH DAKOTA

SOUTHWESTERN DIVISION

WILLIAM HERBERT HUNT AND NELSON BUNKER HUNT,

Plaintiffs,

vs.

PAN AMERICAN ENERGY, INC., a North Dakota corporation;
MOBIL OIL CORPORATION, a New York corporation;
MELVIN "Pat" BALLANTYNE,

Defendants.

COMPLAINT

For their First Cause of Action, plaintiffs allege:

I

Plaintiffs are citizens and residents of the State of Texas. The defendant Pan American Energy, Inc. is a corporation organized and existing under the laws of the State of North Dakota; Mobil Oil Corporation is a corporation organized and existing under the laws of the State of New York and authorized to do business in the State of North Dakota; that the defendant Melvin Ballantyne is a citizen and resident of the State of North Dakota.

II

That the amount and value of the property which is the subject of this suit exceeds the sum of $10,000.00.

III

That the plaintiffs are, among other things, actively engaged in the purchasing from the owners of coal in North Dakota coal leases. As a preliminary to negotiating and purchasing coal leases, the plaintiffs did cause a large amount of exploratory geophysical work to be done, including the drilling of a large number of test holes several hundred feet into the ground, an analysis of the cuttings from said borings, and caused said holes to be logged by electrical and/or radioactive logs as part of an extensive program to determine the absence or presence of coal deposits, the thickness of said deposits and the amount of overburden, and that the plaintiffs expended in excess of $500,000.00 in the assembly of such geophysical information which was necessary in the evaluation of tracts of land as coal properties. That all of such data and information so obtained by the plaintiffs were their sole and exclusive property and in the nature of trade secrets to which they alone were entitled.

IV

That the defendants Pan American Energy, Inc. and Ballantyne wrongfully and in a manner presently unknown to the plaintiffs, came into possession of logs and other geophysical information which was confidential and belonged solely to the plaintiffs, disclosing subsurface conditions which revealed the presence or absence of coal deposits, and using such confidential data and information, leased or contracted to lease, many tracts, to the extent of approximately 100,000 acres, from the owners of the coal which plaintiffs desired to lease in areas which plaintiffs' investigation showed commercial coal deposits. Defendants Pan American Energy, Inc. and Ballantyne knew or should have known by the use of reasonable diligence that this information and data belonged solely to plaintiffs.

V

That plaintiffs have been informed and believe that defendants Pan American Energy, Inc. and Ballantyne have offered to sell and assign or have sold or assigned, such coal leases, in whole or in part, to the defendant Mobil Oil Corporation. That prior to the commencement of this action, plaintiffs notified Mobil Oil Corporation that they believed the coal leases referred to in this paragraph were obtained by Pan American Energy, Inc. and Ballantyne by the use of such confidential information wrongfully obtained, and informed Mobil Oil Corporation that plaintiffs would claim the right to such leases, and that if Mobil Oil Corporation has acquired such leases, then and in that event they hold them in trust for the use and benefit of plaintiffs.

VI

That defendants Pan American Energy, Inc. and Ballantyne have acquired such coal leases by the use of information and data to which they were not entitled, to the damage of plaintiffs, and such leases are held in trust for the benefit of the plaintiffs.

For their Second Cause of Action, plaintiffs allege:

I

Plaintiffs re-allege Paragraphs I through VI as set forth in their First Cause of Action.

II

That the defendants Pan American Energy, Inc. and Melvin Ballantyne have wrongfully obtained and used confidential data and information belonging to plaintiffs, described in plaintiffs' First Cause of Action, without having plaintiffs' permission, thereby preventing plaintiffs from acquiring coal leases shown by such information to be underlain by merchantable coal deposits, all to the damage of plaintiffs in a sum exceeding $5,000,000.00, as may be determined by the evidence.

WHEREFORE, Plaintiffs pray:

1. That the coal leases taken by Pan American Energy, Inc. or Melvin Ballantyne be declared to be held in trust by them for the use and benefit of plaintiffs.

2. That if Mobil Oil Corporation has acquired any right, title or interest in said coal leases from defendants Pan American Energy, Inc. or Ballantyne, that it be adjudged that Mobil Oil Corporation holds such leases in trust for plaintiffs.

3. That the plaintiffs have and recover damages against the defendants Pan American Energy, Inc. and Melvin Ballantyne, under their Second Cause of Action, for the sum of $5,000,000.00, or such sum as the evidence shall disclose they are entitled to.

Dated at Bismarck, North Dakota, this 17th day of October, 1973.

PEARCE, ANDERSON, PEARCE,
THAMES & PEARCE

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IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

CIVIL No. 1263

PRE-TRIAL BRIEF

WILLIAM HERBERT HUNT AND NELSON BUNKER HUNT,
Plaintiffs,

vs.

PAN AMERICAN ENERGY, INC., a North Dakota corporation;
MOBIL OIL CORPORATION, a New York corporation;
MELVIN "Pat" BALLANTYNE,
Defendants.

FACTS

A. Hunt Operations

In 1971, William Herbert Hunt and Nelson Bunker Hunt became interested in the possibility of leasing and developing coal resources in the State of North Dakota. In pursuit of this objective, the Hunt brothers directed geologists and landmen of Hunt Oil Company to study the area and to come up with a plan for acquiring leases and developing the possible coal resources.

In carrying out their mandate, the Hunt geologists studied all available published information on coal resources in

North Dakota and instituted a coal exploratory program. In carrying out the coal exploratory program, the Hunt geologists would establish general areas of interest and then direct that test holes be drilled and logged in those areas. Initially the test holes were drilled in a random pattern within given areas. As data from the initial test holes became available, geologists would interpret the data and direct that additional holes be drilled in patterns which would provide information for the delineation of coal beds and deposit areas. The determination of what coal beds were mineable was made by Hunt coal geologists using predetermined parameters of seam thickness, amount of overburden, availability of transportation facilities, etc.

In the coal exploratory program, the test holes were drilled by contract drillers at locations specified by Hunt representatives. During the drilling the contract drillers would take samples of the cuttings every five feet and lay these on the ground for the logging crew to describe. The logging crew further would assign each hole a code number, consisting of an alpha-numeric designation, note the location of the test hole both by description and on a map, describe the samples of the hole, electronically log the hole, clean up the hole, and destroy the pattern of the samples taken. The loggers would then deliver the original log of the holes, and the description of the samples, along with the alpha-numeric code number and location to the Hunt geologists. Delivery was accomplished by either mailing the information at periodic intervals to the Dallas office of Hunt Oil Company or by physically delivering the material to the Hunt geologist who was in the area at the time. The Hunt geologists were frequently in the area and would hand-carry the above mentioned material to Dallas on their return trips.

The Hunt geologists active in the North Dakota coal exploratory program at all material times were Mark Reishus and D. A. Zimmerman. These two geologists would plot test hole locations on an area map, and if there appeared to be sufficient coal, in accordance with predetermined parameters, they would either request additional control locations or delineate the boundaries of the desirable coal deposits on the map. The line defining the coal deposit was known as the "buy line" and the area within was the "buy area" or "target area".

After preparing the maps delineating the "target areas" the geologists would deliver same to the Hunt Land Department in Dallas. The Land Department would then initiate a program to secure leases within and adjacent to the "target areas".

In certain instances, the above outlined procedures would be altered in some respects. This modification came about because of the dynamic environment in which the coal exploratory program was operating. As an example of how the normal procedures might be modified, if a logger noted a particular hole contained a thick seam of coal, he might call such information in to the Dallas office. The overseeing geologists would then direct that additional test holes be drilled in locations to more fully delineate the seam and would in turn furnish a preliminary "target area" to the Hunt Land Department. The Land Department would then initiate procedures to lease in the general area of the "target" while the geologists were still gathering data and refining the boundaries.

During the period of the Hunt coal exploratory program in North Dakota, 1971 through early 1973, Hunt drilled approximately 2,200 test holes at a cost of $385,500.00. The total investment of the Hunts in North Dakota exploration and leasing, including the acquisition of leases, salaries of landmen, and salaries of geologists was $1,178,818.00. Using the geological data from the exploration program and in certain instances, published data on known areas of coal deposits, approximately 20 "buy areas" were established by the Hunt organization.

During the Hunt coal exploratory program, Todd Ballantyne, a son of Melvin "Pat" Ballantyne, was employed by

the Hunts as a logger. Todd worked from October 23, 1972 to December 22, 1972. Todd was hired by Mark Reishus after he, Mark, had consulted with D. A. Zimmerman.

In February of 1973, Hunt landmen noted heavy competition for leases in many of the "target areas" they were working in. At about the same time the landmen became aware of rumors that their major competition for leases, Pan American Energy, Inc., a new North Dakota corporation, was receiving confidential geological data of the Hunts. Efforts to confirm these rumors were made but were essentially unsuccessful. In the meantime, the competition by Pan American Energy, Inc. increased and caused a substantial increase in the prices necessary to acquire coal leases.

In August of 1973, the Hunts learned that Mobil Oil Corporation had made or was in the process of making a deal with Pan American Energy, Inc. for the purchase of the coal leases acquired by Pan American Energy, Inc. To confirm Mobil's involvement in the Pan American Energy, Inc. leases and to advise Mobil of Hunts' suspicions that Pan American Energy, Inc. was using Hunts' confidential information in acquiring leases, Mr. Jim Beavers, a Hunt landman, made arrangements to meet Mr. Gene Hixson, Mobil's Exploration Manager for Oil Shale and Oil in North America, in Denver on September 7, 1973. At the meeting with Mr. Hixson, Mr. Beavers learned that Mobil had entered into an option agreement with Pan American Energy, Inc. to purchase the coal leases of Pan American. Mr. Beavers also learned that Pan American had furnished to Mobil certain "logs" of test holes drilled in North Dakota and other material.

In attempting to find out or confirm the source of the logs furnished by Pan American to Mobil, Mr. Beavers exhibited to Mr. Hixson a copy of a Hunt "log". Hixson stated that the Hunt "log" was very similar to the "logs" furnished to Mobil by Pan American.

Mr. Beavers then returned to Dallas and subsequently made arrangements to meet with Mr. Hixson in Denver on September 18, 1973, to pursue the identification of the logs furnished by Pan American to Mobil. However, on September 17, 1973, Hixson advised Beavers and Jim Jordan that on September 15, 1973, Mobil had returned all of the material in question to Mr. "Pat" Ballantyne. Mr. Hixson also informed Mr. Beavers that Mobil was going to go ahead with its option to purchase Pan American leases. Mr. Beavers informed Mobil that Hunt claimed the leases and that a lawsuit would be filed.

B. Operation of Pan American Energy, Inc., Ballantyne Brothers, Continental Title Company, and Melvin "Pat" Ballantyne

Melvin "Pat" Ballantyne is a resident of Minot, North Dakota, who has interests in, among other things, farming, banking, oil and coal. Mr. Ballantyne has long been active in the oil business and is familar with geologists and their work. In the past Mr. Ballantyne employed Mark Reishus as a geologist.

Most of the business ventures of "Pat" Ballantyne are directly or indirectly financed by the Ballantyne Brothers, a partnership consisting of "Pat" Ballantyne and Russell Ballantyne. According to "Pat" Ballantyne's testimony taken at depositions in this case, he became interested in the acquisition of coal leases in 1972. As a preliminary to acquiring coal leases, Mr. Ballantyne alleges he gathered published information on coal deposits in North Dakota and using this information and public information garnered from County Courthouses, he began to buy coal leases. In pursuing his plan to acquire coal leases, Mr. Ballantyne did not undertake any independent program to gather empirical geological data and he did not employ any geologists. Mr. Ballantyne states that his intentions were to buy leases "in-between" leases taken by other companies based on the geological data he had.

The leases purchased by Mr. Ballantyne were taken in the name of Pan American Energy, Inc., a North Dakota corporation* formed in January 1973. The drafts used to pay for the leases and all expenses relative to the leases were written on Continental Title Company, and the consideration for the leases was furnished to Continental Title Company by Ballantyne Brothers.

The exact relationship between Melvin "Pat" Ballantyne, Pan American Energy, Inc., Ballantyne Brothers, and Continental Title Company and their officers, directors, and shareholders is as yet undetermined by the plaintiffs. The beneficial owners of the leases taken by Pan American Energy, Inc., according to a letter signed by Melvin Ballantyne, dated February 14, 1975, and received in this office on February 25, 1975, are Melvin W. Ballantyne, Russell Ballantyne, Charles Ballantyne and the Ballantyne Family Trust.

As previously stated, Pan American Energy, Inc. began taking leases in October of 1972. To the best of plaintiffs' knowledge, the first lease of Pan American was taken on October 4, 1972, in the Tioga area in Williams County. On October 23, 1972, Todd Ballantyne started work for the plaintiffs. Todd worked for plaintiffs from October 23, 1972 through December 22, 1972, and during his employment, Todd Ballantyne made copies of plaintiffs' "logs" and furnished those logs to his father, Melvin "Pat" Ballantyne. The copies of the logs admittedly taken by Todd Ballantyne, were in the Dunn, Stark and McKenzie County areas where Pan American Energy, Inc. has acquired leases.

During the lease acquisition program of Pan American Energy, Inc., approximately 125,000 gross acres of land were leased. During the spring of 1973, Mr. Ballantyne made attempts to sell the leases he acquired. In attempting to

* Leases were also taken in names derived from Pan American Energy Inc., such as Pan American Energy, Inc. of Denver, Colorado, but this fact is not relevant for a basic understanding of the facts.

sell his lease block, Mr. Ballantyne or his agents contacted these known companies: Northern Natural Gas Company, Cities Service, ARCO (Atlantic-Richfield), Mobil Oil Corporation and Sun Oil Company.

In July of 1973, an option agreement was finally worked out with Mobil Oil Corporation. Subsequent to the signing of the option agreement with Mobil Oil Corporation, Pan American Energy, Inc. furnished to Mobil Oil Corporation logs of test holes drilled in North Dakota. A geologist employed by Mobil Oil Corporation plotted on a map the locations of test hole locations with alpha-numeric code numbers. The geologist additionally indicated on the map the test hole "logs" which he felt indicated the presence of major seams of coal.

The logs and supplementary material used by the Mobil Oil geologist to prepare the "Mobil Map" were returned to Pan American Energy, Inc., on September 15, 1973.

Pan American Energy, Inc., also furnished to Mobil Oil Corporation ten "logs" which have come to be known as the "Wilhite logs". The "Wilhite logs" were obtained by an employee of Pan American Energy, Inc. from an employee of Mr. I. J. Wilhite. In conjunction with furnishing the "Wilhite logs" to Mobil, Pan American Energy, Inc. also furnished what has come to be known as the "Wilhite letter". The "Wilhite letter" is a letter addressed to I. J. Wilhite and bearing the signature of Melvin "Pat" Ballantyne, with an inscription at the bottom bearing the initials "I. J. W." Mr. I. J. Wilhite has testified that he never saw the letter and that the postscript and initials I. J. W. appearing on the letter were not made by him.

Mr. "Pat" Ballantyne and his son, Todd, have testified that the "logs" furnished to Mobil Oil Corporation were fabricated by Todd and his little sister, and were to be used by Melvin "Pat" Ballantyne as a sales tool in attempting to sell the Pan American block of leases. Mr. "Pat" Ballantyne states that the fabricated logs were turned over

to Mobil on the advice of his lawyer. His lawyer, Mr. Thomas Wentz, denies ever having advised Mr. Ballantyne to turn such over to Mobil Oil Corporation.

During 1972, on two separate occasions, Mr. "Pat" Ballantyne wrote checks to Mr. Mark Reishus, one of the Hunt geologlists. The total amount of the checks was $4,000.00, and Mr. Ballantyne alleges that these checks represented loans made by him to Mr. Reishus.

C. Mobil Oil Corporation Claims

Mobil Oil Corporation and Pan American Energy, Inc., signed an agreement on July 12, 1973. The agreement gives Mobil an option to purchase the coal leases held by Pan American Energy, Inc. On September 7, 1973 and September 17, 1973, prior to Mobil's exercise of the option agreement, Mobil was notified by Mr. Jim Beavers of the Hunts' claim to the leases held by Pan American Energy, Inc.

The Hunts filed the instant action in October of 1973.

APPLICABLE LAW

A. Case in Chief

In the case at bar plaintiffs have alleged that defendants Pan American Energy, Inc. and Melvin "Pat" Ballantyne have, through improper means, gained access to plaintiffs' trade secrets and using those trade secrets have leased coal land in North Dakota in direct competition with plaintiffs. Plaintiffs further allege that defendant Mobil Oil Corporation accepted a transfer of Pan American Energy, Inc. coal leases with notice that plaintiffs asserted a claim to those leases.

The plaintiffs in this action are citizens of the State of Texas, the defendant Melvin "Pat" Ballantyne is a citizen of the State of North Dakota, the defendant Pan American Energy, Inc., is a North Dakota corporation with its prin-

cipal place of business in North Dakota, and the defendant Mobil Oil Corporation is a New York corporation with its principal place of business in New York. Jurisdiction in the present action is founded on Diversity of Citizenship, 27 U.S.C. § 1332.

The general law to be applied in the present action is the substantive law of the State of North Dakota. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1968). In looking to North Dakota law the plaintiffs have been unable to find any decision of North Dakota state courts or any statutes controlling the present action. In circumstances where the state courts have not ruled on a particular question it is the duty of the Federal Court to independently ascertain the law that would be applied if the State's highest court were presented with the question. *Bittner v. Little*, 270 Fed. 286 (3rd Cir. 1959), *Julander v. Ford Motor Co.*, 488 F. 2d 839 (10th Cir. 1973).

In reviewing the law of trade secrets, plaintiffs find that the common law, and the law applied in many states, is as stated in 4 Restatement Torts § 757 (1939). See *Abbott Laboratories v. Norse Chemical Corporation*, 147 NW2d 529, 535 (Wisc. 1967) and *E. I. duPont de Nemours & Co. v. Christopher*, 431 F2d 1012, (5th Cir 1930), cert. den. 400 U.S. 1027 (1971). The Restatement provides:

> "One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if
>
> (a) he discovered the secret by improper means, or
>
> (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, or
>
> (c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper

means or that the third person's disclosure of it was otherwise a breach of his duty to the other, or

(d) he learned the secret with notice of the facts that it was a secret, and that its disclosure was made to him by mistake."

Plaintiffs contend that the Restatement contains a correct statement of the general law of trade secrets and the substance of the law which would be applied by the Supreme Court of North Dakota if that Court were faced with the factual situation at bar.

In applying the above cited section of the Restatement, plaintiffs allege that defendant Pan American Energy, Inc. and Melvin "Pat" Ballantyne obtained plaintiffs' trade secrets by improper means. Plaintiffs also allege that their trade secrets were disclosed to defendants by Mark Reishus and Todd Ballantyne. Plaintiffs will introduce evidence showing that defendants had plaintiffs' trade secrets and that Mark Reishus and Todd Ballantyne furnished plaintiffs' trade secrets to defendants Melvin "Pat" Ballantyne and Pan American Energy, Inc.

In discussing plaintiffs' Burden of Proof in a trade secret case, the following elements are listed by Milgrim:

"Plaintiff, by a preponderance of the evidence, must prove the following elements in order to be granted relief:

(1) Plaintiff is the owner of a trade secret.

(2) Plaintiff disclosed the trade secret to defendant; or defendant wrongfully took the trade secret from plaintiff without plaintiff's authorization.

(3) Defendant was in a legal relation with reference to plaintiff as a result of which defendant's use or disclosure of the trade secret to plaintiff's detriment is wrongful.

(4) Defendant has used or disclosed (or will use or disclose) the trade secret to plaintiff's detriment; or defendant, who knew or should have known of plaintiff's rights in the trade secret, used such secret to plaintiff's detriment. (Footnotes omitted) *12 Business Organization, Milgrim, Trade Secrets*, § 27.07 (1) PP. 7-46 to 7-48.

With respect to item (1) above, plaintiffs in this action will prove that they are the owners of a Trade Secret. In defining a trade secret, comment (b) to Section 757 of the Restatement, Torts (1939) states:

"A trade secret may consist of any formula, pattern, devise, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. . . . Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Plaintiffs claim trade secret status for all logs of test holes drilled in North Dakota, for all lists of locations of test holes, for all descriptions of test hole cuttings, and for all representations of geological or geophysical data derived from the aforementioned items. The representations of geological and geophysical data include "buy areas" or "target areas" outlined on maps and oral representations in regard thereto.

With respect to plaintiffs' trade secrets, the evidence will show that the geological and geophysical information

obtained by plaintiffs during their exploration program was not widely known either inside or outside the coal business; that the plaintiffs took reasonable precautions to guard the secrecy of their information; that the information was invaluable to plaintiffs; that the plaintiffs expended in excess of $300,000.00 in first gathering the information, and that the information could not be duplicated without the expenditure of large sums of money.

With respect to item (2) above, the evidence will show that Mark Reishus and Todd Ballantyne, by virtue of their employment with plaintiffs, had access to plaintiffs' confidential information, and that plaintiffs did not authorize Mark Reishus, Todd Ballantyne or any other individual to disclose plaintiffs' confidential information to anyone outside the Hunt organization.

With respect to item (3) above, plaintiffs have alleged that the disclosure of plaintiffs' trade secrets to defendants Pan American Energy, Inc. and Melvin "Pat" Ballantyne by Mark Reishus and Todd Ballantyne was in violation of a legal relationship between those individual and plaintiffs. In this regard the case of *Hunter v. Shell Oil Company*, 198 F2d 485 (5th Cir. 1952) is directly on point. The 5th Circuit Court of Appeals in that case discusses disclosure and use of confidential information by an employee. In the *Hunter* case the Appeals Court affirmed the trial court's finding that any gain derived from the use of an employer's confidential information would be held in trust for the employer.

The trial court declaration of a constructive trust in the *Hunter* case extended not only to the employee's gain from the use of confidential information but also to the gain of any individual who knowingly accepted the benefits of an unauthorized disclosure. For an excellent evaluation of the law in this area see *Conflict of Interest in the Oil and Gas Industry*, Donald A. Canuteson, 9 National Institute for Petroleum Landmen 239 (1968), written by Mobil's counsel in Dallas, Texas.

Apart from the fact that defendants Pan American Energy, Inc. and Melvin "Pat" Ballantyne received confidential information from Mark Reishus and Todd Ballantyne, those defendants are under a separate obligation not to make use of information obtained by improper means. The obligation not to make use of plaintiffs' confidential information springs from the defendants' duty to observe commercial morality. In defining the concept of commercial morality, Milgrim states:

> "Thus, defendant's duty to observe commercial morality makes aerial photography of plaintiff's secret process plant under construction wrongful, despite absence of breach of confidential relationship or trespass." *E. I. duPont de Nemours & Co. v. Christopher*, 431 F 2d 1012 (5th Cir. 1930) cert. den. 400 U.S. at 1027 (1971), *12 Business Organization, Milgrim, Trade Secrets*, § 27.08 (1) (c) PP. 7-52.2 and 7-52.3.

Defendants' duty to observe commercial morality in the instant case, precludes them from obtaining plaintiffs' confidential information by any improper means. Plaintiffs have alleged that Melvin "Pat" Ballantyne and Pan American Energy, Inc. wrongfully gained access to plaintiffs' trade secrets in a manner presently unknown to plaintiffs. Plaintiffs do not feel that they must prove the exact manner in which the defendants gained access to plaintiffs' trade secrets. Plaintiffs did not authorize the disclosure of their trade secrets to anyone outside the Hunt organization and the only way the defendants could have obtained plaintiffs' trade secrets would be by improper means.

In considering paragraph (4) above, plaintiffs' evidence will show that defendants Melvin "Pat" Ballantyne and Pan American Energy, Inc. used plaintiffs' confidential information to purchase coal leases in direct competition with plaintiffs. The wrongful competition by defendants resulted in defendants obtaining coal leases which plaintiffs would otherwise have obtained and also, in certain instances, drove or increased the prices which plaintiffs had to pay for coal leases which they did obtain.

B. Mobil Oil Corporation Defenses

1. BONA FIDE PURCHASER

Mobil Oil Corporation has alleged in its Answer to plaintiffs' Complaint that it was a good faith purchaser for a valuable consideration. Mobil has not alleged any facts which would support this asserted bona fide purchaser status.

As stated in plaintiffs' recitation of the facts, Mobil Oil Corporation and Pan American Energy, Inc. signed an option agreement on July 12, 1974. On September 7th and September 17th, 1973, Mr. Jim Beavers notified Mobil Oil Corporation of Hunts' claim to Pan American's leases.

In the case of *Larson v. Cole*, 33 N.W. 2d 325 (N. D. 1948) the North Dakota Supreme Court considered the legal relationship created by an option to purchase an interest in realty. In that case the Court stated:

> "An option is a continuing offer. 12 Am. Jr. 524. It may or may not be accepted. It does not bind the optionee to do anything unless he accepts. That rests entirely with him. It gives him merely a personal right to purchase but not an interest in the optioned property." *Larson*, supra, at P. 331.

In the instant case the option gave Mobil no interest in the leases. Mobil merely had the right to purchase the leases on the terms outlined in the option agreement. Mobil's exercise of the option was after Hunts had informed Mobil of Hunts' claim to the leases and any interest in the leases acquired by Mobil Oil Corporation was subject to Hunts' claim.

2. LACHES

Mobil's answer to plaintiffs' Complaint does not set out any facts supporting Mobil's defense of laches and plaintiffs are unable to ascertain how this defense fits into the present case. Plaintiffs view Mobil's position as either standing or falling on the question of Mobil's alleged status as a good faith purchaser for a valuable consideration, without notice of the plaintiffs' claim.

FACTUAL ISSUES AND EVIDENCE TO BE OFFERED

A. Case in Chief

The statement of the factual issues in this case is relatively simple: Did defendants Pan American Energy, Inc. and Melvin "Pat" Ballantyne have and make use of plaintiffs' trade secrets in their coal leasing program and did Mobil Oil Corporation have notice of plaintiffs' claim prior to exercising the option agreement between Pan American Energy, Inc. and Mobil Oil Corporation? Plaintiffs allege that they did.

Plaintiffs proof of the activities of defendants, however, will not always be susceptible of direct proof in all of its ramifications. Like a conspiracy or a fraud case, the activities of defendants may be also and will be partially established by circumstantial evidence.

> "All experience shows that positive proof of fraudulent acts * * * is not generally to be expected, and it is for that reason, among others, that the law allows in such controversies a resort to circumstances as the means of ascertaining the truth, and the rule of evidence is well settled that circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidence, be sufficient to constitute conclusive proof * * *" *Hunter v. Shell*, quoting from *Wagner v. Hall*, 82 U.S. (16 Wall) 584, 601, 21 L. Ed. 504, 506.

In support of plaintiffs' allegations the following evidence will be offered:

(1) Evidence of the recording dates of plaintiffs' leases, the origination dates of defendants' leases, the location of plaintiffs' leases, and patterns and locations of defendants' leases and testimony in regard thereto.

Defendant Melvin "Pat" Ballantyne has stated that his method of operation in acquiring coal leases was to buy "in

between" companies "depending on the geological data that we had". He has further testified that he never employed a geologist nor did he drill any test holes exploring for coal. Plaintiffs' evidence will be visually displayed and will show that defendant's explanation of his leasing program does not stand up to scrutiny. In many cases defendant did not buy "in between" plaintiffs or other companies' leases.

(2) Evidence showing geological parameters of plaintiffs' "target or buy areas" and locations of defendants' leases.

This evidence will be visually displayed and will establish that defendants leased almost exclusively in or adjacent to plaintiffs' "target or buy areas". Many of the plaintiffs' areas were in locations which had not been published and the pattern of defendants' leases will establish that defendants had knowledge of plaintiffs' "target or buy areas".

(3) Evidence that Mr. Melvin "Pat" Ballantyne was, in fact, leasing for coal prior to Todd Ballantyne's employment by plaintiffs. Testimony of Todd that he, in fact, took logs and other information from plaintiffs while he was employed by them, in breach of his employment relationship, and furnished such information to his father.

(4) Evidence of the payment of $4,000.00 by Melvin "Pat" Ballantyne to Mark Reishus after Mobil had signed their option agreement. Further, evidence that Reishus at times called Ballantyne's residence, billed the charges to plaintiffs and other expense records.

(5) Evidence of a course of conduct establishing the contact between Melvin "Pat" Ballantyne and Mark Reishus during the plaintiffs' exploratory and leasing program in North Dakota.

(6) Evidence that the map taken by Charles Ballantyne from Robert Frosaker immediately preceding

Frosaker's deposition in Minot, in November of 1974, generally follows plaintiffs' "target or buy areas".

(7) Evidence of the contradictory testimony of Melvin "Pat" Ballantyne, Todd Ballantyne, Charles Ballantyne and others in regard to testimony of other party and non-party witnesses, which taken as a whole, will assume color and significance from what has been established by direct evidence.

(8) Evidence that Melvin "Pat" Ballantyne, in an attempt to sell his leases, furnished to ARCO, a list of "shot points" which is, in fact, a list of hole locations drilled by plaintiffs and which was furnished to Ballantyne by his son Todd.

(9) Testimony of Jim Slack, Land Supervisor for Oil, Shale and Coal, that Todd Ballantyne took an active part in the sale of the Pan American leases to Mobil.

(10) Testimony of Mr. Jon Francis Abshire, an employee of Mobil Oil Corporation regarding a map he prepared for Mobil from the logs allegedly given to Mobil by Melvin "Pat" Ballantyne, and further testimony that these locations and numerical designations thereon are, in fact, those of the plaintiffs.

(11) Evidence and testimony of Jim Beavers meeting and calls to and from Gene Hixson, Mobil's Exploration Manager for the Oil, Shale and Coal Unit in North America, setting forth plaintiffs' claim to the Pan American Energy, Inc. leases, Mobil's notice thereof and its actions in regard thereto.

(12) Possible testimony of Don Sass, an independent landman and expert long active in the mineral industry, as to customs in the leasing business and his opinion in regard to the leasing program of

Pan American Energy, Inc. and Melvin "Pat" Ballantyne.

(13) Testimony of Mr. Bruce Alfson, an independent landman, that Charles Ballantyne admitted to him that the Ballantynes were getting Hunts' information from Mark Reishus, and finally, other evidence which will be presented during the trial which, taken as a whole, will establish the validity of plaintiffs' claim.

ANTICIPATED EVIDENTIARY PROBLEM

The plaintiffs intend to offer into evidence testimony of Mr. Bruce Alfson, Williston, North Dakota, concerning a conversation Mr. Alfston had with Mr. Charles Ballantyne. The substance of that conversation is as follows:

> "Q. (Mr. Thomas continuing) Just answer. What did he say?
>
> A. Alright. He said that they get all Hunts' information through Mark Reishus." Lines 9-10, P. 8, *Deposition of Mr. Bruce Alfson*, January 8, 1975.

* * * * *

By Mr. Bucklin:

Q. And as you discussed the oil and gas lease, was there any other subject of conversation that came up?

A. Yes. Before we went into the details of the oil and gas lease I remarked to him that I know Mark Reishus, who I understand was the geologist for them at one time before he went to work for Hunt Oil Company, and he said "Yes, that's correct". He says, "That's where we get all Hunts' information". *Alfson Deposition*, supra, at lines 5-12, P. 21.

Plaintiffs purpose in offering this testimony is to establish the facts asserted in the testimony.

The abovementioned testimony is admissible in the instant action for the reason that it is an admission against the interest of Melvin "Pat" Ballantyne and Pan American Energy, Inc. by an agent of those entities concerning a matter within the scope of a then existing agency. In discussing the admissibility of Admission of Agents, *2 Jones on Evidence*, § 13:26, P. 470, states:

> "It may be said that there are five standards for the admissibility of evidence of statements by an agent when offered against his principal as admissions. They are . . . (4) when the statement of the agent is of res gestae quality or is made with respect to an act in the scope of the agency and 'while he is doing it', and (5) as an enlargement of (4), when the statement made by the agent 'concerned a matter within the scope of a then existing agency' ". (Footnote omitted.)

Rule 801 (d) (2) (D) of the recently approved *Federal Rules of Evidence* contains the substance of the rule stated in *Jones*.

> "(d) *Statements which are not hearsay*. A statement is not hearsay if
>
> * * * * *
>
> (2) *Admission by party-opponent*. The statement is offered against a party and is . . . (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment made during the existence of the relationship . . ."

The *Federal Rules of Evidence* are not in effect at the present time, however, they should be given weight as a statement of what the law should be in this area. The Federal Rules are a culmination of thirteen years of study by Judges, Members of Congress and many lawyers. See Senate Report No. 93-1277, 12A *U.S. Code Congressional and Administrative News* 41 (1975).

Rule 43 of the Federal Rules of Civil Procedure governs the admissibility of evidence in the present action. In commenting on Rule 43, *9 Wright and Miller, Federal Practice and Procedure*, § 2403, P. 313 (1971), states:

> "Rule 43(a) created a three pronged test for the admissibility of evidence. Evidence shall be admitted if it is admissible under federal statutes, or under the rules of evidence heretofore applied in federal courts in suits in equity, or under the rules of evidence in the courts of the state in which the federal court is held. The statute or rule that favors the reception of the evidence governs and the evidence is to be presented according to the most convenient method prescribed by any of the three methods to which the test makes reference."

The plaintiffs have not found any authority for the admissibility of the proffered evidence under federal statute or rules of evidence applied in federal courts in suits in equity. The admissibility of the testimony of Mr. Alfson must then be governed by the rules of evidence applied in North Dakota courts. In researching State law the plaintiffs have been unable to find any cases which have considered the exact question presented to the Court. The plaintiffs argue, however, that if the North Dakota Supreme Court considered the question of the admissibility of an admission by an agent it would adopt the rule stated in *Jones* and *The Federal Rules of Evidence* as quoted above. The plaintiffs base their argument on the fact that a substantial trend favors the rule propounded by plaintiffs.

> "The tradition has been to test the admissibility of statements by agents, or admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principles employ agents for the purpose of making damaging statements, the usual result was exclusion of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment. *Grayson v. Williams*, 256 F. 2d 61 (10th Cir. 1958), *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines v. Tuller*, 110 U.S. App. D.C. 282, 292 F. 2d 775, 784 (1961), *Martin v. Savage Truck Lines, Inc.* 121 F. Supp. 417 (D.D.C. 1954), *Advisory Committee* Note (d) (2) (iv), *Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, P. 98 (1971).

The plaintiffs would also point out that rules of admissibility should not be as stringently applied in cases tried to the Court as they would be in cases tried to a jury. *U. S. v. 1,291.83 Acres of Land, More or Less, in Adair and Taylor Counties, Com. of Ky.*, 411 F. 2d 1081 (6th Cir. 1969).

As foundation to the offer of Mr. Alfson's statement, plaintiffs will introduce admissible evidence as to the nature and scope of the agency of Mr. Charles Ballantyne.

REMEDIES

As a remedy for defendants Pan American Energy, Inc. and Melvin "Pat" Ballantyne's wrongful appropriation of plaintiffs' trade secrets, plaintiffs have requested that the Court declare a constructive trust on leases held by Pan American Energy, Inc., Melvin "Pat" Ballantyne and Mobil Oil Corporation and/or that they be awarded compensatory damages. Plaintiffs have also requested in their Amended Complaint that they be awarded punitive damages.

Plaintiffs will brief the issue of plaintiffs' proper remedy after the Court has decided the issue of liability.

Dated this 3rd day of March, 1975.

PEARCE, ANDERSON, PEARCE,
THAMES & PEARCE

By C. B. THAMES, JR.

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IN THE

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF NORTH DAKOTA

SOUTHWESTERN DIVISION

WILLIAM HERBERT HUNT and
NELSON BUNKER HUNT,

Plaintiffs,

v.

PAN AMERICAN ENERGY, INC., a
North Dakota corporation;
MOBIL OIL CORPORATION,
a New York corporation,
MELVIN "PAT" BALLANTYNE,

Defendants.

MEMORANDUM OF DECISION

AND

ORDER

GENERAL NATURE OF THE CASE

In this diversity action tried to the Court on the issue of liability only, Plaintiffs William Herbert Hunt and Nelson Bunker Hunt, seek to impose an implied trust on certain

North Dakota coal leases taken by Defendant Pan American Energy, Inc., a North Dakota corporation, a substantial number of which leases were later transferred to Defendant Mobil Oil Corporation, a New York corporation. Plaintiffs allege that Pan American Energy, Inc., and its president, Defendant Melvin "Pat" Ballantyne, came into possession of confidential Hunt geophysical information, and used that information to acquire the leases. Plaintiffs also seek money damages. Defendants deny the allegations. Defendants Pan American Energy, Inc., and Ballantyne specifically deny they acquired information wrongfully, and that leases were acquired because of any such information. As an additional defense, Mobil Oil Corporation alleges it acquired the leases in good faith, and for a valuable consideration.

GENERAL FACTS

The first extensive coal exploration and leasing in the State of North Dakota began in 1971, and has continued on a broad scale to the present time. Plaintiffs' exploration, which commenced in October, 1971, and continued into 1973, was done by Hunt Oil Company, a service company. Defendant Melvin "Pat" Ballantyne is a resident of North Dakota. His principal occupation is agricultural, but he has been active in oil, gas, banking, coal and other ventures. Whatever ventures he pursued were generally financed by a partnership, "Ballantyne Brothers". It consisted of Pat and his brother, Russell Ballantyne. In 1971, Pat Ballantyne became interested in coal, and through published data, surveillance of lease recordings in country courthouses, visiting with farmers in areas generally considered to be coal areas, and other methods, he began acquiring information on coal deposits in western North Dakota. Having never employed geologists, he did not depend to any extent on empirical geological data. Ballantyne's intentions were to buy "in-between" leases taken by major companies, which he would determine from the data he was accumulating.

The operation worked something like this:

Pan American Energy, Inc., a corporation, was organized as the vehicle through which leases would be taken. Charles Ballantyne, another brother, was the field man for the operation. He organized crews, watched lease play, would compile the data and forward the information to Melvin.

It became Melvin's job to plot the data he received from Charles on various highway maps upon which he had already plotted the "known" information. From these maps, Melvin determined Pan American's main areas of interest, which he would send back to Charles with orders to purchase leases. Charles, in turn, would employ landmen to help do the actual purchasing.

The Ballantynes purchased leases in a period from October, 1972, to the spring of 1973. Nearly all were taken in the name of Pan American Energy, Inc., but some, for "effect" were taken in the name of Pan American Energy, Inc. of Denver, Colorado.

The drafts used to pay for the leases and the expenses incurred in obtaining the leases were written on Continental Title Company. The consideration for the leases was, however, furnished to Continental Title Company by the Ballantyne Brothers.[1]

William Herbert Hunt and Nelson Bunker Hunt, in proceeding with their coal land acquisition program, bought their first lease in October, 1971. The operation was directed and controlled from Hunts' Dallas headquarters. The Hunt organization was much more scientific and coordinated in its coal exploration program. In addition to studying general published data, various target areas were designated and then test holes were drilled and logged. As data from the initial test holes became available, geologists would interpret the data and direct that additional holes be drilled in patterns which would provide information for the delineation of coal

[1] See Exhibit 3153.

beds and deposit areas. The determination of what coal beds were mineable was made by Hunt coal geologists, using predetermined parameters of seam thickness, amount of overburden, availability of transportation facilities, proximity of water supplies, etc.

In the coal exploratory program, the test holes were drilled by contract drillers at locations specified by Hunt representatives. During the drilling, the contract drillers would take samples of the cuttings every five feet and lay these on the ground for the logging crew to describe. The logging crew, further, would assign each hole a code number, consisting of an alpha-numeric designation, note the location of the test hole, both by description and on a map, describe the samples of the hole, electronically log the hole, clean up the hole, and destroy the pattern of the samples taken. The loggers would then deliver the original log of the holes, and the description of the samples, along with the alpha-numeric code number and location to the Hunt geologists. Delivery was accomplished by either mailing the information daily to the Dallas office of Hunt Oil Company, or by physically delivering the material to the Hunt geologist, if one was in the area at the time, who would forward it to Dallas. The Hunt geologists headquartered in Dallas, but made frequent trips to North Dakota.

The Hunt geologists active in the North Dakota coal exploratory program at all material times were D. A. Zimmerman and Mark Reishus. These two geologists would plot test hole locations on an area map, and if there appeared to be sufficient coal, in accordance with predetermined parameters, would either request additional locations or delineate the boundaries of the desirable coal deposits on the map. The line defining the coal deposit was known as the "buyline" and the area within was the "buyarea" or "target area".

After preparing the maps delineating the "target areas", the geologists would deliver same to the Hunt land department. The land department would then initiate a program to secure leases generally within the "target areas".

In certain instances, the above outlined procedures would be altered in some respects. This modification came about because of the dynamic environment in which the coal exploratory program was operating. As an example of how the normal procedures might be modified, if a logger noted a particular hole contained a thick seam of coal, he might call such information to the Dallas office. The overseeing geologists would then direct that additional test holes be drilled in locations to more fully delineate the seam, and would, in turn, furnish a preliminary "target area" to the Hunt land department. The land department would then initiate procedures to lease in the general area of the "target", while the geologists were still gathering data and refining the boundaries.

During the period of the Hunt coal exploratory program in North Dakota, 1971 through early 1973, Hunt drilled approximately 2,200 test holes at a cost of $385,500.00. The total investment of the Hunts in North Dakota exploration and leasing, including the acquisition of leases, salaries of landmen, and salaries of geologists, was $1,178,818.00. Using the geological data from their exploration program, and in certain instances published data on known areas of coal deposits, approximately 22 "buyareas" were established by the Hunt organization.

During the Hunt coal exploratory program, Todd Ballantyne, a son of Melvin "Pat" Ballantyne, was employed by the Hunts as a logger. Todd worked from October 23, 1972, to December 22, 1972. Todd was hired by Mark Reishus after consultation with D. A. Zimmerman.

In February of 1973, Hunt landmen noted heavy competition for leases in many of the "target areas" they were working in. At about the same time, the landmen became aware of rumors that their major competition for leases, Pan American Energy, Inc., a new North Dakota corporation, was receiving confidential geological data of the Hunts. Efforts to confirm these rumors were made, but were essentially unsuccessful. In the meantime, the competition by Pan Ameri-

can increased, and in one area caused a substantial increase in the prices necessary to acquire coal leases. By then, Pan American's acquisition had reached approximately 125,000 gross acres. It was the Ballantynes' plan to sell block leases to major coal companies. Pat Ballantyne worked with Alan Dreusdow, a business broker from Omaha, Nebraska, in contacting potential buyers, which included the following companies: Northern Natural Gas Company, Cities Service, ARCO (Atlantic-Richfield), Mobil Oil Corporation and Sun Oil Company.

The first meeting with Mobil Oil, the eventual purchaser, took place June 11, 1973, in Denver.

Following the conference, James Slack, a Mobil representative, negotiated and executed a handwritten option agreement with Ballantyne. It was dated July 7, 1973, and granted Mobil Oil Corporation a five day option to purchase the leases.[2] Mobil Oil Corporation paid $1,000.00 for this five day option.

On July 12, 1973, a final purchase agreement was executed.[3] By its terms, Mobil was to have the leases subject to an option to return them and stop the royalty payments on such return. Mobil Oil alleges the transaction must be considered a purchase instead of an option, since they had "a title and escrow agent possession of the lease assignments which completely prevented Ballantyne from selling the leases elsewhere."

At that time, Mobil received from Ballantyne, ten Ward County logs which are referred to in this case as the "Wilhite" logs. Subsequently, another group of logs were handed over to the Mobil organization. These particular logs were later plotted by a contract geologist of Mobil's, John Abshire.

On September 6, 1973, Mobil was, for the first time, contacted directly by Hunt Oil Company representatives. Jim Beavers, Hunts' chief landman, made arrangements to meet

[2] Exhibit 6007.
[3] Exhibit 6009.

with Gene Hixson, Mobil's exploration manager for oil shale and oil in North America, in Denver, on September 7, 1973. At that meeting, Beavers learned of the arrangement that Mobil Oil had entered into with Pan American Energy, Inc. He also became aware of certain logs, purported to be logs of test holes in North Dakota, and other material received by the Mobil organization from Pan American.

Beavers went as far as exhibiting a copy of a Hunt log to Hixson in an effort to determine whether Hunt data was the source of the logs received from Pan American.

After Beavers returned to Dallas, he made arrangements to meet with Hixson again on the 18th day of September, to pursue the identification of the logs furnished by Pan American to Mobil. Hixson had promised to check with management and legal counsel to determine whether it would be proper for him to exhibit the material received from Ballantyne to Hunt personnel. Hixson was advised to not show Pan American's materials without Pan American's consent. Hunt was not ready to alert Ballantynes to their investigation, and asked that Mobil not contact Ballantynes for their approval.

On September 15, 1973, upon request of Pat Ballantyne, all the materials received from Pan American were returned by James Slack of Mobil.[4]

In October of 1973, Hunt began its lawsuit. On October 19, 1973, the Court issued an order requiring Ballantyne to deposit with the Court the following:

> "Shooting plats, maps of shotpoints and drilling locations of test holes, radioactive or other logs of test holes bored, and any and all documents, writings, charts, graphs, maps, and all information pertaining to the geological evaluation of coal properties located in the State of North Dakota, which may be in the possession, custody or control of the defendants, including but not

[4] Exhibit 6017.

limited to all information of every kind and nature furnished to the defendant Mobil Oil Corporation."

ISSUES

1. Were leases of Pan American acquired as a result of Hunts' confidential information?
2. Was Mobil a purchaser or encumbrancer for value in good faith without notice?

THE LAW

The Proof Necessary To Establish An Implied Trust.

The implied or constructive trust was originally a creature of equity used as a remedial device. North Dakota statutes provide for it. NDCC 59-01-06. An implied trust makes holders of legal title a trustee for another who in good conscience is entitled to the benefit of the property. (See 89 CJS, *Trusts* §§ 139-159 for general discussion of Constructive Trusts).

> "59-01-06. Implied trust — How created — An implied trust arises in the following cases:
>
> 1. One who wrongfully detains a thing is an implied trustee thereof for the benefit of the owner;
> 2. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an implied trustee of the thing gained for the benefit of the person who would otherwise have had it;
> 3. Each one to whom property is transferred in violation of a trust holds the same as an implied trustee under such trust, unless he purchased it in good faith and for a valuable consideration;
> 4. When a transfer of real property is made to one person and the consideration therefor is paid by or for

> another, a trust is presumed to result in favor of the person by or for whom such payment is made."

In order to establish a constructive or implied trust in property, the evidence must be clear, convincing, satisfactory and of such a character as to leave no hesitation or substantial doubt in the mind of the trier of fact. The North Dakota law in implied trusts is best stated in this quote:

> "*The evidence to establish an implied trust, however, must be clear and convincing.* There must be a satisfactory showing of a wrongful detention of the property, or fraud, undue influence, the violation of a trust, or other wrongful act by virtue of which the party is holding title to property which he should not hold under the rules of equity and good conscience. *The evidence must be strong enough to lead to but one conclusion. If the evidence is doubtful or capable of reasonable explanation upon theories other than the existence of a trust, it is not sufficient to establish a trust.*" (emphasis added). *Bodding v. Herman*, 35 N.W. 2d 561 at 563 (N. D. 1949).

This language from *Bodding* has been followed specifically by subsequent North Dakota decisions. *In re Estate of Paulson*, 219 N.W. 2d 132, 138 (N.D. 1974) includes the quote in its discussion of implied trusts and represents the latest affirmance of this position.

See also, *Trengen v. Mongeon*, 206 N.W. 2d 284, 287 (N.D. 1973); *Kutchera v. Kutchera*, 189 N.W. 680, 687 (N.D. 1971), ("To establish an implied or constructive trust, however, the evidence must be clear and convincing"); *Wildfang-Miller Motors, Inc. v. Miller*, 186 N.W. 2d 581 (N.D. 1971):

> "This general rule has long been followed in North Dakota. In McDonald v. Miller, 73 N.D. 474, 16 N.W. 2d 270, 271 (1944), in paragraphs 1, 3, and 4 of the syllabus, this court held:

'1. A constructive trust will be imposed by the courts in order to do equity and prevent unjust enrichment when title to property is acquired by fraud, duress, undue influence, or is acquired or retained in violation of a fiduciary duty.

'3. The existence of a constructive or resulting trust in real property may be established by parol evidence that is clear, convincing and satisfactory.

'4. Where it is sought to impose a constructive trust upon a conveyance of real estate the existence of a confidential relationship between the grantor and grantee is of major importance to be considered in connection with other facts and circumstances in the case.' " 186 N.W. 2d at 585.

In addition, *Frederick v. Frederick*, 178 N.W. 2d 834 (N.D. 1970), declares at page 839 that, "In order to establish an implied trust, the evidence must be clear, specific, substantial, and convincing."

Other early cases include *Sprenger v. Sprenger*, 146 N.W. 2d 36, 41 (N.D. 1966), (which restates the "clear and convincing" rule of *Bodding); Johnson v. Larson*, 56 N.W. 2d 750, 756 (N.D. 1953), (which also states the rule in *Bodding), McDonald v. Miller*, 16 N.W. 2d 270 (N.D. 1944), (which although preceded *Bodding* did follow a "clear, convincing and satisfactory" standard).

"Clear and convincing evidence" is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to allegations sought to be established; it is more than a preponderance of evidence but less than that required to establish guilt beyond a reasonable doubt in criminal cases, and it does not mean clear and unequivocal. *Hobson v. Eaton*, 399 F. 2d 781 (7th Cir. 1968), cert. den. 394 U.S. 928. See also *Brown v. Warner*, 107 N.W. 2d 1 (S.D. 1961).

In addition to the clear and convincing burden, the plaintiffs must show causal connection on each area claimed. NDCC 59-01-06 provides that for there to be an implied trust, there must be proximate cause between the wrongful act and the thing sought to be imposed with the trust.

> "2. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto; an implied trustee of the thing gained for the benefit of the person who would otherwise have had it." 59-01-06(2).

Hunter v. Shell Oil Co., 198 F. 2d 485 (5th Cir. 1952) sets forth a clear explanation of the theory of causal connection as related to a case of this type. Hunter was a geologist employed by Shell Oil Co., who was alleged to have passed confidential information to others subsequently receiving participating interests in the leases taken based on that information. The circuit court affirmed the trial court's reasoning that Shell could have a constructive trust only as to leases in those areas taken based on confidential data.

> "It is unnecessary that plaintiff establish every transaction with separate independent and isolated proof of the influence and effect of Hunter's information upon that particular transaction viewed *in vacuo*. It is enough that the circumstances, taken as a whole, constitute clear, convincing and trustworthy proof as to each tract." 198 F. 2d at 490.

The "tract" in the present case is an "area" as they are discussed by the parties. It will be necessary for the plaintiffs to produce clear and convincing evidence as to each area claimed.

Under subheadings that follow, the Court will discuss the evidence and the specific areas involved, and state its findings of ultimate facts.

THE EVIDENCE

1. Todd Ballantyne

Todd's employment with the Hunt Oil Company dated from October 23, 1972, to December 22, 1972. He had been hired by Mark Reishus. His duties involved logging and coring work. The method of Hunt drillers was to drill a hole, and then "loggers" would record the information in graph form. That graph form was immediately dispatched to Hunts' office and neither the logs nor copies of logs were ever sent back. The opportunity Todd would have to acquire confidential information was limited by this procedure and by his brief period of employment.[5]

In the course of Todd Ballantyne's employment, he was told of the locations of holes being drilled which he was to log, and also where other loggers might be found. Todd kept notes of these drill hole locations, which were eventually used by him in the fabrication of "bogus" logs. Further, drill hole locations could be ascertained by anyone willing to tour the countryside and follow drilling units.

Todd Ballantyne also admitted taking Xerox copies of ten logs on holes which were drilled around his father's farm (Hanel Farm) in Dunn County. He also made copies of three logs from McKenzie County, and seven from Stark County, which he called "souvenirs" of his employment with Hunt.

The evidence shows that Todd Ballantyne was openly employed under his correct name, and Reishus and Don Zimmerman were both aware that he was the son of lease broker, Pat Ballantyne.[6]

It was Todd's testimony that the material was not turned over to his father until the summer of 1973. This was about

[5] *See generally* Exhibits 6031, 6072, 6073, which show the large number of logs Hunts made showing commercially mineable coal (741) and the small percentage to which Todd had access (64).

[6] Zimmerman testified that he was aware that Pat Ballantyne "had the potentiality" to go into business.

the time Pat Ballantyne was in search of "promotional" material to aid in the sale of the leases.

The undisputed evidence is that of all of the Hunt logs produced by Hunt during the entire period of Todd Ballantyne's employment, only 64, which were from the McKenzie, Hettinger, Dunn, and Williston County areas, showed coal deposits.[7] Zimmerman testifying for Hunt, stated that the logs Todd took were really of no commercial value; at best, they disclosed where not to buy because those logs showed no coal. Todd had very little access to the information in the Williston office. Because nothing was ever sent back to North Dakota, all that would have been available were those logs made during Todd's employment. No actual logs were alleged to have been taken, and the testimony showed that the office was tended by someone other than Todd at all times.

The Court FINDS there is no clear and convincing evidence that any Pan American coal leases were obtained as a result of confidential Hunt information transferred to Ballantynes or any one else connected with Pan American Energy, Inc., by Todd Ballantyne.

2. Mark Reishus

Mark Reishus had been a long time friend of the Ballantyne family, having grown up in the same area. Ballantyne had helped finance him through college, and after obtaining a degree, Reishus worked for Pat Ballantyne as a geologist. He was later employed as a coal geologist by the Hunt Oil Company. Plaintiffs now allege that in violation of the confidential employer-employee relationship between Reishus and the plaintiffs, Mark Reishus furnished Pat Ballantyne and Pan American with confidential data.

[7] See Exhibit 6031. Todd worked in McKenzie County from October 23, 1972, to November 10, 1972. He worked in Hettinger County from November 13 through November 15, 1972. He worked in the Dunn County area November 15 and 17, and went back again for 3 days from November 19 through the 21st in 1972. The remainder of the time, from November 17, 1972, to December 18, 1972, was spent in the Williams County area, doing core holes.

Plaintiffs rely on circumstantial evidence to support their conclusion that Mark Reishus was passing Hunt information to the Ballantynes.

Reishus received two checks from Pat Ballantyne in the fall of 1973, totalling $4,000.00. Ballantyne and Reishus both testified the money was a loan.[8] The first was dated August 13, 1973, and was in the amount of $2,500.00.[9] The other was for $1,500.00, and was drawn on September 22, 1973.[10] Reishus testified that the money was borrowed to cover a number of personal debts. There were no promissory notes given at the time the checks were issued. Only after questioning by the plaintiffs' private investigator[11] did Mark Reishus send Pat Ballantyne a note, and then only for $2,500.00. It was postmarked October 17, 1973.[12]

Hunts' suspicions of Ballantyne became known to Reishus in February, 1973, when Reishus and others had been asked to take the polygraph test.

Reishus had denied giving Ballantyne confidential information. Evidence of the test results was received without objection. The probative value of this evidence, if any, was corroboration of Reishus' denial.

Plaintiffs rely heavily on a statement allegedly made by Chuck Ballantyne to Bruce Alfson, an independent lease broker from Williston, North Dakota. The conversation, in which Chuck reportedly declared that Pan American "got all their coal information" from Mark Reishus, is alleged to have taken place in December of 1972. Chuck Ballantyne denied ever having made such a statement. The alleged conversation came to Hunts' attention when Alfson told Ray Kemmis, a former district landman for Hunt Oil Company,

[8] Ballantyne carried it on his books as loans.

[9] See Exhibit 3159.

[10] See Exhibit 3160.

[11] William Murphy of "Dale Simpson and Associates", Dallas, Tex.

[12] See Exhibit 3157.

and a personal friend of Alfson, of the statement some time after the commencement of the lawsuit in October of 1973. Alfson testified that in the late summer or early fall of 1974, Jim Jordan spoke to him regarding the comment.[13] Kemmis testified that after the filing of the lawsuit had been reported in the newspapers, he happened to mention the case to Alfson, who commented that "he [had] talked with a fellow in Minot, Ballantyne . . . and . . . that somehow or other he felt that they were getting some of the information from the Hunt logs."

From this evidence, plaintiffs conclude:

> "Chuck's statement to Alfson, coupled with the fact of Pan American's leasing, constitutes sufficient evidence to support the Hunts' case and the imposition of a constructive trust upon all of the Pan American leases. Chuck, of course, denied having made the statement to Mr. Alfson but no other attack of any substance was made upon Mr. Alfson's credibility or veracity. Chuck's credibility, on the other hand, is non-existent. More important, however, Mr. Alfson's testimony need not stand alone and is fully supported and corroborated by other facts adduced." *Plaintiffs' Post Trial Brief at p. 6.*

The "other facts adduced" apparently refer to telephone calls from Reishus to Ballantyne and certain of Reishus' expense records from which the time of his trips to North Dakota could be proved.[14] Reishus offered plausible explanations of his telephone calls, and evidence established that the trips to North Dakota were in the legitimate course of employment with Hunts. The fact that Reishus had the opportunity, through such trips, to pass information to Ballantyne does not raise the inference that he did.

[13] Kemmis reported to Jordan, who in turn interviewed Alfson personally. This version is in conflict with Alfson's trial testimony wherein he was emphatic that Chuck Ballantyne made such a statement. Kemmis and Alfson also differ on the date of their conversion.

[14] See Exhibits 3264, 3266, 3267, 3268, and 6074.

Reishus continued in Hunt's employ until November of 1974.[15] At one time, in the period between the taking of the polygraph test and the termination of his employment, Herbert Hunt learned that Reishus was negotiating with another company that was looking for a geologist with both oil and coal experience. Hunt asked Reishus to stay with the Hunt organization.

Plaintiffs have presented their case on the theory that Mark Reishus was the primary source from which Ballantyne obtained confidential Hunt information. The fair preponderance of the evidence before this Court is not sufficient to support such a theory. Reishus' testimony and demeanor at trial was forthright and credible, and he was subjected to minimum adverse cross examination. Other individuals in the Hunt organization, in addition to Reishus, had access to Hunts' logs and "buyareas".

The Court FINDS there has been no clear and convincing proof that Ballantyne acquired that information from Reishus or any other Hunt employee.

3. The Abshire Maps

When Todd Ballantyne left the employment of Hunts, he took with him various travel receipts and papers he had accumulated during his employment. Among the accumulation were his scratch pad sheets, on which he had jotted down where he was to log each day, and where other people affiliated with the Hunt organization could be found if he needed to communicate with them in the field.

These "memory sheets" became particularly useful when Todd's father was preparing to market the leases he had acquired. Pat had very little geological data which a prospective buyer would normally want to examine, and was in need of sale devices. It was then Todd was asked to manufacture some logs, and realizing that anyone who started

[15] The case was originally set to commence for trial in December of 1974.

to check the logs would expect to find some physical evidence of holes being drilled, he used his scratch pad list of holes to assign locations to some of the logs. Other locations used on the logs were alleged to have been obtained by Pat and Chuck Ballantyne riding the countryside sighting various drill holes.

The "memory sheets" contained approximately sixty locations, generally in the Dunn County area.[16] About sixty Hunt locations show up on a list of "shotpoints" furnished to Atlantic-Richfield during the sales efforts of Ballantyne.[17] They also show up on a map prepared by a Mobil consulting geologist, Bruce Abshire, some time in August of 1973. In addition to the Wilhite logs, Mobil received a second group which consisted of a hundred or more logs. They apparently were not reviewed in detail by Mobil geologists, Bruce Howe and James Keenan, who gave them only a cursory inspection. The logs were given to Abshire who plotted them on a highway map showing not only their location, but also the drill hole number, which he found, according to his recollection, on the face of the logs.[18]

Don Zimmerman, the Hunt geologist, compared the Abshire map with Hunts' records concerning the locations of drill holes, the number of the holes, and other information. He compiled this information on a separate map, in evidence as Exhibit 3265.

The Abshire maps show that logs were submitted for locations, some of which were Hunt locations, others which turned out not to be Hunt locations. The Zimmerman map dated the drill hole locations and ascertained that Hunt locations appearing on the Abshire plat were drilled during the time Todd Ballantyne was in Hunts' employment.

[16] The memory sheets were never submitted to the Court, having apparently been lost. Todd's testimony supports the contention that memory pads were used.

[17] Exhibit 3187.

[18] Exhibits 3205 and 3206.

Further, the Abshire plat shows logs submitted for Hunt drill locations where the Hunts did not make logs. (The map in the logging rig of Todd showed Dunn County and McLean County locations, but not where logs had been taken).

Drill hole numbers plotted by Mr. Abshire do correspond with a number of drill hole numbers, given to the holes by Hunts' field personnel. The hole numbers assigned in the field were, in some instances, changed for clarification purposes by Hunts' Dallas office. (Apparently the system was to number the locations numerically; in Dunn County, two logging outfits began numbering from 1, causing obvious confusion. To remedy the situation, 100 was added to one set of location numbers, i.e. changing hole No. 1 to hole No. 101). The Dallas numbers did not appear on the Atlantic-Richfield shot point list or the Abshire maps. Also, logs did not receive numbers until they reached the Dallas office. The numbers on Todd's lists and Abshire's plat are not the numbers on the logs Hunt introduced into evidence. They are the numbers on Hunt holes.

Further, the Abshire plat established that Abshire interpreted some of the logs he used as showing coal seams at certain locations at a thickness in excess of ten feet, but Hunt logs for the same locations showed a lesser thickness.

Abshire described the logs furnished him as being of "very poor" quality. In fact, he testified he could not plot some because of bad and illegible writing. All witnesses agreed that Hunts' logs were of high quality. The Abshire plottings are inconsistent with Hunt logs. They are, however, consistent with Todd's limited knowledge that holes were in certain points, and with his testimony that he assigned known hole locations to his manufactured logs.

The plaintiffs urge that the evidence is conclusive that Pan American had copies of Hunts' logs and buttress their argument by emphasizing:

1. There are no drill hole numbers on the bogus logs. (Exhibits 4000-4214).

2. Other geologists who testified could not interpret the "bogus" logs, since they lacked scale and depth information, yet Abshire was able to make some type of interpretation.

3. Hixson's testified that the logs delivered to Mobil and used by Abshire to plot his map did not look the same as bogus logs.

The Court has considered Hunts' argument and FINDS:

There is evidence before the Court that certain "supplemental material", in the form of Todd's memory pads, was also given to Mobil which did carry shotpoint locations, by section, range and township of the drill holes. While Abshire recalled that "the logs contained in addition to the graph portion, well number and location" (indicating figures on the logs themselves, he also responded in the following manner:

> "Was there any other information that you used in constructing the work you did on this map other than logs?"
>
> * * *
>
> "As I recall, there were a few sheets. I can't give you an exact number of supplemental location data".

Abshire had difficulty interpreting the logs turned over to him and, as noted, which he described as of very poor quality. It is a reasonable inference he would have had no such difficulty with logs produced by the highly competent Hunt organization.

Hixson was very uncertain in his attempt to recall from his memory a comparison of the logs, and the Court assigns little weight to that portion of his testimony.

The Court FINDS that the Abshire plat fails to establish in a clear and convincing manner that it was prepared through the use of Hunt logs.

4. Wilhite Logs and Letter.

By February of 1973, the Ballantynes had leased a substantial number of acres in the Velva-Sawyer area of Ward County, allegedly based on published geological data. When Pat Ballantyne was ready to sell the leases, he once again was in need of information or data to promote a sale.

It was common knowledge that the Wilhite Drilling organization (then operating as Star Drilling Co.) had drilled in the Velva-Sawyer area. After expressing to Chuck an interest in obtaining some Wilhite drilling information, Pat called Wilhite's drilling company directly. Although Wilhite's employee, Skjod, told Ballantyne he would check and see whether logs were available for sale by their company, Ballantyne never received any further response from Wilhite.

In the meantime, Chuck had told a Ballantyne employee, Kelly Eliason, of Pat's desire to obtain Wilhite data. Eliason had worked for Wilhite, and he, in turn, contacted his former boss, Howard Rolle, a general field supervisor for Star Drilling Co. (Wilhite). Rolle stated that he was able to sell drill hole logs.

Rolle took actual drill logs of Wilhite that were outside the Velva area. With Eliason's help, he cut off the tops of the logs which showed the true locations of the drill holes and assigned to the logs actual locations where Wilhite had drilled in Ward County. He wrote these actual locations on the logs, and represented them to be actual logs of Ward County.[19] He sold them to Eliason for $250.00. Eliason, in turn, told Chuck Ballantyne that he could get the logs for $300.00; Eliason received the sum from Chuck, pocketed $50.00 for himself, and wrote his own personal check to Rolle for the $250.00.[20]

In connection with this sale and purchase, Pat Ballantyne was told that in order to get the logs, he needed to write

[19] The Wilhite logs are Exhibit 6023.

[20] The check to Howard Rolle is Exhibit 3200.

a letter to Wilhite. A letter was written, Exhibit 6026. Ostensibly it was delivered to Wilhite who penned a response on the letter and returned it. It appears from the evidence that the letter was never in fact delivered, and the response was forged.

After Labor Day of 1973, when Mobil questioned the source of Ballantyne's logs, Ballantyne gave Mobil the letter indicating the source of the Ward County logs.[21]

The significance of the Wilhite logs is questionable. Plaintiffs believe these logs are an attempt to cover up the true source of information.

> "The story of the Wilhite logs (Exhibit M6023) was told many times in the course of the trial and will not be here detailed. It should again be noted, though, that those logs played no part in Pan American's buying and that Pan American clearly did not care what the logs showed; otherwise Mr. Eliason would not now be employed by Pan American and its principals. The Wilhite logs, like the Jodry letter, were simply an attempt to cover the true source of the information being utilized." *Hunt Post Trial Brief*, at 16.

The evidence is not conclusive. The Court FINDS that the existence of these logs is not proof per se that Hunt Company logs[22] were used in the leasing of Ward County tracts. At best, they are proof of Ballantyne's attempts to deceive potential lease purchasers.

5. The Frosaker Maps.

The maps, which became known as the "Frosaker maps",[23] relate specifically to the Williams-Grenora, Dunn County and Morton County areas.

[21] See Exhibit 6035.

[22] Although those Ward County ("Wilhite") logs are similar to Hunt logs, and contain coding information of section, township and range, with a hole numbering system like the Hunts, even the Hunt geologists agree conclusively that they are not copies of Hunt logs.

[23] Exhibits 3216 through 3226, and 3253 through 3256, 3258, and 3260 are of parts of Dunn County. Exhibits 3227, 3232 and 3234 through 3237 are of Morton County, and Exhibits 3238 through 3240 are of Williams-Grenora.

Robert Frosaker was employed as a landman by Pan American in February of 1973. He had been recruited for the job by another Pan American employee, Howard Saterlie. He was to be paid a commission on the acres he was able to lease. The amount he received per acre increased during his employment as he gained experience.

Frosaker would receive township maps from the Pan American home office with the lease areas desired marked with an "X". In the early part of his employment, he was directed by Saterlie or Clayton Locken (who later replaced Saterlie in the Ballantyne organization). Eventually, he received his directions from Chuck Ballantyne.

After Mobil entered into its agreement with Ballantynes, Frosaker was hired directly by Mobil.[24]

Subsequent to the instigation of this lawsuit, he was employed extensively by a "lease holder" from Chicago, J. R. Sweeney, who has leased approximately 50,000 mineral acres in North Dakota. A great deal of this acreage is in the Dunn and Williams County area. According to Sweeney, eighty percent of his leases were purchased by Frosaker.

Frosaker's deposition was taken on November 13, 1974, at which time he produced numerous maps which he had used in his leasing operations. The maps were identified at the trial, and several contained lines which might be interpreted as buylines. Frosaker testified, however, that he had no idea where the information came from which established the buyline. The fact that the maps were used by Frosaker while buying leases for three different employers over an extended period of time, and revised as his leasing operations progressed, destroyed their probative value in the effort to determine the buylines, if any, that were furnished him by the Pan American operation.

The Court FINDS the Frosaker maps are not clear and convincing evidence Hunt information was used by the Pan American operation in obtaining coal leases in the area worked by Frosaker.

[24] Frosaker is no longer in the coal leasing business, and is presently engaged in selling advertising in Minot, North Dakota.

6. The Testimony of William Eastwood.

Defendant Mobil called as an independent expert, William Eastwood, presently a geologist for Consolidated Coal Company. In his past employment as a professor of geology at Dickinson State College, Eastwood was engaged in the Federal Government's Little Missouri Grasslands Study. Eastwood searched out coal resources by checking the acreage leased for coal in Bowman, Slope, Billings, Golden Valley, McKenzie, Dunn, Stark, Hettinger, Adams, Morton, Oliver, Mercer, McLean and Grant Counties. His work was done primarily during the fall of 1972 and the fall of 1973. He checked the courthouse records to determine where coal companies were leasing. Eastwood testified he found the procedure relatively simple. The results of his work illustrate graphically that the Ballantyne method of selecting areas for leasing was realistic.

Eastwood prepared maps on which he noted the areas under coal lease and the companies which held the lease. The work in the fall of 1972 follows a pattern similar to that followed by Pat Ballantyne. Each map was color coded to indicate what company leased in any given area. By comparing the Eastwood maps with the maps prepared by Ballantyne in his leasing program, it is apparent the procedure which Ballantyne claimed he used in obtaining coal information was feasible.

It is of interest to compare lease maps of Hunt, Pan American and Eastwood covering the same area. An example is an area in Hettinger County. Pan American Exhibit 5120, Hunt Exhibits 3131 and 3125, and Mobil's Exhibit 6045 (Eastwood Map) all cover the same area. The Eastwood map and the Pan American map appear to record all coal leases taken by all companies, and show many companies to be in the area. In contrast, the two Hunt exhibits show only Hunt buylines, Pan American leases and known coal deposits. The Hunt maps would leave the impression that Hunt was alone in the area and that Pan American, by leasing in Hunts' area, was proceeding on information wrongfully obtained from Hunt.

A similar example is found in Stark County where Pan American Exhibit 5118, Hunt Exhibits 3134 and 3137, and Mobil Exhibits 6049A and 6049B show the same general areas.[25]

Examples of other companies that leased in Hunts' buy-area are Camargo in Morton County (Exhibit 6053A), Consolidated Coal Company in McLean (Exhibit 6047A, B, C), Lignite Power Electric in Hettinger (Exhibit 6045), and A. C. Golden in Stark County (Exhibit 6049A-C).[26]

Eastwood's map of Morton County, Exhibit 6052, is another example of the information one could obtain simply by recording the lease play of other companies. The general contour of the Hunt buyline in the New Salem-Glen Ullin area as disclosed on Exhibits 3135-3136 can be detected by looking at the Eastwood map.

Ballantyne had available to him similar data which he alleges he compiled in a similar manner. See Exhibits 5126, 5127, 5128. In addition, he had the available Government data. After examining any topographical map or merely making visual observation of the area to block out buttes and other areas where there would obviously be a deep overburden, an individual could reasonably guess the favorable lease areas.

7. Pan American Buying Procedures.

Measured by Hunts' standards, Pan American's leasing operation, as described by the Ballantynes, could not be considered scientific or coordinated. It was a gambling venture built on information gleaned from every possible source, not the least of which was the observation of the activities of major companies, accomplished through visual observations in the field and monitoring the recording of leases in the offices of the register of deeds in coal counties. Hunt alleges the operation extended beyond that which was legal and that confidential Hunt information was obtained and used.

[25] Other comparisons are made in the individual discussions of the areas where appropriate.

[26] A. C. Golden appeared at one time in so many of Hunts' buying areas that Beavers mistakenly accused Golden of having access to secret geological information of Hunt.

Information Available To The Ballantynes

Prior to, and during the period that the Ballantynes conducted their leasing program, a considerable amount of public information was available. Among the various published documents were United States Department of Interior publications #182 and #906B (Exhibits 5131A and 5131B). These concerned governmental studies of stripable coal reserves in North Dakota and the Minot area.

In addition, the defendants had in their possession data provided by the Burlington Northern Railroad, successor to Northern Pacific, which identifies areas of coal rights which the railroad controls.[27] The information was available upon request. Other less scientific material was also available in the form of books and treatises such as the publication, "Trail of the Pioneers", submitted as Exhibit 5132.

The testimony of Richard Jodry of the Sun Oil Company, establishes that Pat Ballantyne did have some geological reports prior to his actual leasing. These reports were sufficient to cause Sun Oil to have a genuine mining interest. Jodry commented in his testimony:

> "Q. And in your contact with Mr. Ballantyne, could you state the representations made to him by you in your capacity as a Sun geologist?
>
> A. He stated that he had leases in — I think, perhaps 12 areas, something — again, this order of magnitude, I'm not sure — 12 areas in North Dakota that he would

[27] Exhibit 5121.

like to sell, and so I asked him on what basis these were taken and again, he pulled out a large number of geological reports, either state or federal, saying that here is this area — this is a geological report — and another one here — another report, and because they have shown coal in the areas, we have gone in and leased.

Q. Mr. Jodry, you said that if Ballantyne had not been in this Williams County area that Sun Oil might very likely have gone into that area themselves. Now, why would Sun have been interested in that area. Can you just tell me in general terms why it might be interested?

A. Because there again, there was published data and there was some oil wells that had been drilled in the area whose logs indicated — these things are public record — indicated that some of the anomalies on the logs might indicate coal.

Q. Williams County is in the oil producing area, isn't it?

A. Correct.

* * *

Q. All right. There is geological information on that county?

A. Yes."

The Government publications are detailed enough to lead an interested individual to concentrate in certain areas. The evidence substantiates that Ballantyne did eventually concentrate his leasing activities in many of the areas set forth in 5131A and 5131B.

Norbert Kmoch is a lease broker from Denver who is the president of a Nevada corporation also entitled Pan American Energy, Inc. He became collaterally involved with this lawsuit when a portion of the public began to confuse

his company with that of the Ballantynes. In some of their leasing, the Ballantynes used the name Pan American Energy, Inc. "of Denver", which Chuck said was merely for effect. People dealing with the Ballantynes began calling Kmoch regarding leases taken and this confusion caused an eventual meeting between Pat Ballantyne and Kmoch. Subsequent meetings led to discussions about the Ballantyne operation. Kmoch's testimony corroborates the contention that the Ballantyne leases were generally taken based on available geological information, continuous monitoring of recording data in county courthouses and watching the location of other coal company rig play.[28]

Alan Druesdow, who assisted Pat Ballantyne in marketing his leases, also testified as to the presence of general, public, geological data.

The checking of recording data was common procedure and could not be considered unusual. J. R. Sweeney indicated that this was his method of operation after first determining areas of interest from public information. He further noted that he purposely would follow Peoples Gas Company because of his respect for their past judgment.

The practice of checking recording data was also followed by Hunt. Jim Beavers, Hunts' chief executive officer, testified that the Hunt operation would routinely check courthouse records to determine where others were leasing in areas of interest. Hunts loggers and drillmen were also instructed to keep tabs on other drilling companies they encountered.

Ray Kemmis, a former Hunt employee, testified as to the practice of checking courthouse records. He had been a register of deeds in North Dakota, preceding his Hunt employment.

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[28] Kmoch testified that he accompanied Pat Ballantyne when he was out checking drilling sites. As Beavers testified, it was a practice even Hunt employed. It was upon these circumstances that Hunt tripped on Mobil drilling crews working in areas it had purchased from Ballantynes.

"Q. Is there any connection with the sort of work that you do in — as a Register of Deeds and the sort of work that's involved in finding out where to buy leases?

A. Oh, yes.

* * * * *

Q. And by going to these public records you can tell who has made coal leases in what part of the country?

A. Yes, sir.

Q. Is it possible then to find out which companies are engaged in the lease play in that county by using the public records?

A. Yes; it would be. It is.

Q. And is it possible to find out what acres the leases are being purchased in within the county?

A. Yes; that's the only place to find out, I think."

Jim Jordan, of Hunt Oil, gave the following testimony regarding the practice of lease checking:

"BY MR. BUCKLIN:

Q. In response to Mr. Thames' question you said you do not think that the buy area outline was obtained by Pan American. Why do you think that outline was not obtained?

A. (BY JAMES JORDAN) It was or would be and has been the practice in the past by oil companies to establish what somebody's buying outline might be by going to the courthouse.

Q. In other words, you can obtain that information by going to the courthouse and finding out on the public records where the leases are being purchased?

A. That's possible.

Q. And anybody can do that?

A. That's possible.

BY MR. MAHONEY:

Q. And there is certainly nothing improper about anyone going to the public records and finding out where the lease play is?

A. No.

Q. And buying in the middle of the lease play if they can? Nothing wrong with that, is there?

A. That's competition.

Q. That's the way the business works?

A. That's the way the business works."

Feasibility Of The Operation

The Pan American leasing program was a flexible non-structured operation adopted in each area to the information Ballantynes were able to accumulate. It admittedly involved a great amount of guess work. But the pattern of leasing was based on reading public information, observing drilling activity in these areas, examining courthouse information, noting old or existing coal mines, visiting with the land owners and buying in between the majors.

Without question Pan American purchases do indicate that their areas of interest are similar to those Hunt claims. Those same areas are, however, also consistent with the areas outlined in available public documents as potential coal land.

The plaintiffs take a negative approach to the plausibility of the Ballantyne operation. They preface their discussion of the specific areas of Ballantyne leasing in this manner;

"How was an operation of the scale of Pan American's launched and consummated with such rapidity? Why was Pan American's competition centered on the Hunts and the areas which they had defined? The answer to these questions, quite simply, is that Pan American had obtained the results of all of the Hunt's confidential data compiled over the preceding years.

What information did Pan American have? There were two types of information which Pan American needed and, ultimately, secured. First, it required the geological buying outlines, so that it could be assured that it was not straying too far from the economical coal areas. Second, it needed coal logs. These logs would be of secondary importance in the purchasing of coal leases, "but might become of primary importance in selling the leases to persons or companies who were unfamiliar with the areas and had no independent information." *Hunt Post Trial* Brief, at 3-4.

What the Ballantynes "needed" for their leasing operation and whether the data they purportedly had was sufficient to make reasonable judgments is debatable, but the fact that it is debatable causes the proof to fall short of meeting the required clear and convincing standard for this Court to find that the leases were obtained through the use of confidential Hunt information. To prove the nonfeasibility of a purported method of operation is not sufficient. The required proof goes one step further, and the plaintiffs have failed on that step.

THE AREAS.

Except for some leasing in the Tioga area of Williams County, North Dakota, beginning in October, 1972, the majority of Pan American's leasing activity took place from the 1st of January through April of 1973. In that time, approximately 150,000 acres of coal leases had been taken by Pan American in 15 areas, which Hunt had designated as

"buyareas". The parties have different names for the various areas, and to avoid any confusion, the following chart is included to coordinate the 15 Hunt areas with the Ballantyne-Mobil areas of contested leases. The chart also indicates the name which the Court will use in referring to each area.

Ballantyne Mobil Reference	Hunts Reference	Court Reference	Pan American Overlay Maps	Pat Ballantyne Highway Maps	Eastwood Maps	Hunt Buyline Maps
"B" Hanks-Grenora Williams County	"1" Grenora Williston Avoca	Hanks-Grenora	5000-5004	5100		Grenora 3133 Williston 3128 Avoca 3126
"B" Woburn-Rennie Lake Burke County "C" Niobe-Burke County	"2" Woburn Coteau (Noonan-Kincaid) Niobe	Niobe-Coteau	5005-5009	5103		Coteau 3141 Niobe 3121
"D" Tioga William-Mountrail Counties	"3" M & M Tioga	Tioga	5010-5014	5108B, 5108C		M & M 3120 Tioga 3122
"E" McKenzie County	"4" McKenzie & Sheep Butte "5" Johnson's Corner N. W. Keene	McKenzie County	5015-5018	5136	6046A, B, C	McKenzie Sheep Butte 3139 Johnson's Corner 3138, N. W. Keene 3127
"F" McLean County	"6" Roseglen-(Mountrail) Garrison (McLean)	McLean County	5019-5023	5109, 5110 5112F	6047A, B, C	Roseglen 3140 (Mountrail) Garrison 3119 (McLean)
"G" Sawyer-Velva Ward County	"8" South Prairie & Volva "9"	Sawyer-Volva	5024-5028	5114	6048A, B (Dunn) 6049A, B (Stark)	South Prairie 3124, Volva 3123
"H" Dunn County and Stark County	"10" Windmill & Dickinson "11" Deepcreek "12" was south	Dunn County Stark County	5029-5034	5117 (Dunn) 5118, 5138 (Stark)		Windmill 3132 Dickinson 3134, 3137, Deepcreek 3118
"I" Regent-New England Schiefield Hattinger County	"13" New England-Regent	New England-Regent			6045	New England-Regent 3131
"J" Laith Hattinger-Grant Counties	"14" Elgin	Laith	5035-5039	5120	6045	Elgin 3125
"K" Morton County Glen Ullin-New Salem	"15" New Salem-Glen Ullin Morton County	New Salem-Glen Ullin	5040-5044	5028-5027	6052 6053A, B	New Salem 3135 Glen Ullin 3136 Morton County

See generally Mobil Exhibits 6055 through 6059, which are a map and overlay of the northern half of western North Dakota; Mobil's Exhibits 6060-6064, which are a map and overlays of the southern half of western North Dakota; and Hunts Exhibit 3151-3152 which is a map of the western half of the State of North Dakota.

A. Williams County — Hanks-Grenora

Pat Ballantyne testified the Pan American buy outline in the Hanks-Grenora area is recorded on Exhibit 5100. The information from which the outline was prepared came from checking the lease activity of Hunt and Consolidated Coal Company, who were leasing that area in September of 1972. There were also known coal mines in the region. Pan American acquired a total of 9 leases, comprising approximately 3,234.22 mineral acres. Three of the leases were taken in January, two in April, three in May, and one in August, all in 1973.

It is the plaintiffs' theory that Exhibit 5100 is not the actual Pan American buy outline, but that three maps purportedly made by Robert Frosaker, a Ballantyne landman, show the real outlines. Exhibit 3238, 3239, and 3240. They contend the red lines drawn across those three maps form the real Ballantyne buyline and that they were drawn by Pat Ballantyne, with the aid of Hunt information. Only then were they given to Frosaker for him to begin leasing. Don Zimmerman, Hunts' geologist, transcribed the Frosaker outline to Exhibit 3272, and compares it to Hunts' outline, Exhibit 3271, with a base map, Exhibit 3270.

For the Court to accept the theory, it must discard the outline which Pat Ballantyne contends was the actual Pan American outline. Plaintiffs conclude that the mere existence of the Frosaker map is sufficient to show that what is shown on Exhibit 5100 is simply not the outline.

> "Since Frosaker's testimony concerning the source of his line is uncontroverted, one can only surmise that the true Pan American buying outline was destroyed and that the one put forth by it in this cause was constructed after the fact for the purpose of hiding the true facts and misleading the Plaintiffs and the Court." *Hunts Post Trial Brief* at 10.

The circumstances under which the Ballantynes were ordered to turn over their "geological data" to the Court

should be considered. The complaint was filed October 17, 1973. On October 19, an order was entered requiring the defendants to deposit all their documents with the Court by October 23. A mass of documents was deposited. Exhibit 5100 was one of those documents. It appears unlikely that the map would have been fabricated in that period to mislead the Court. At that point of the litigation, the significance of that map could hardly have been anticipated by the parties. Exhibit 5100 is separate and distinct from the Frosaker map, and the two require separate explanations. An examination of Exhibit 5100 as "a map containing an outline which Pat Ballantyne contends is a final buy line", discloses it could have been drawn based on the information available to the Ballantynes. The map shows evidence of lease checking, and each of the leases eventually taken by the Ballantynes falls within that outline. The plaintiffs' reasoning that the existence of the Frosaker maps necessarily excludes Exhibit 5100 as the true Ballantyne outline is not persuasive.

Plaintiffs allege that the outline found on the Frosaker map, Exhibits 3238-3240,[29] is "remarkably similar" to the Hunt buyline, Exhibit 3133, but only if the Frosaker outline is moved about three miles to the east. They cite this discrepancy as merely error in "copying the map" from Hunts.

It should first be noted that the Hunt buy outline maps are representative of what the Hunt organization claims were their final buy outlines as of January 10, 1974, when the Court ordered its information deposited with the Court.[30]

Aside from that, the "three mile theory" also has its problems. There are several towns in the area of the outlines which very clearly define the area. It seems unlikely that with this type of landmark a person "copying" a buyline would miss this detail. Also, the leases which the Ballantynes

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[29] The circumstances surrounding the creation of the Frosaker maps has already been outlined by the Court, and is pertinent here.

[30] In Williams County, the Hunt logging does appear to have been carried on in three periods — the first from 9-7-71 to 11-12-71; the second from 9-21-72 to 9-29-72, and another from 8-23-72 to 9-14-72.

eventually took are shown by Hunt information to be in worthless coal areas. The plaintiffs would have the Court believe that having confidential data, Ballantyne leased in an area with no coal. The reasoning is inconsistent.

It is Mobil's theory that Frosaker actually was purchasing for J. R. Sweeney in this area, and that the maps and the lines really came from Sweeney. Frosaker testified he didn't know where the lines came from.

> "The evidence to establish an implied trust, however, must be clear and convincing * * * . The evidence must be strong enough to lead to but one conclusion. If the evidence is doubtful or capable of reasonable explanation upon theories other than the existence of a trust, it is not sufficient to establish a trust." *Bodding v. Herman*, 35 N.W. 2d 561, 563 (N.D. 1949).

Plaintiffs further point to the separation between the southwestern portion of the buyline on both their map and Frosaker's. Zimmerman's testimony established that the separation was a result of a topographical feature in the area, and such information was not available in public information. The Hunts allegedly had to construct their own topographic map. Their conclusion: There is no possible source of information for dividing the area except from the Hunts. Yet the plaintiffs have failed to adequately rebut Defendant Ballantyne's map or the theory put forth by Mobil. The existence of the Frosaker maps does not provide that explanation. A clear and convincing standard has not been met in the Hanks-Grenora area.

B, C. Niobe-Coteau.

In the Niobe-Coteau area Pan American acquired seven leases, approximately 4,122 acres, a relatively small acreage. Exhibit 5103 demonstrates that a considerable amount of courthouse checking was conducted by the Ballantynes in this region. Both Consolidated and Hunt appear to have

concentrated on the area, and according to Pat Ballantyne, Pan American felt safe in leasing between them.

The Niobe deposit is defined vividly in the Government's Bulletin 182, and the data is visible on Pat Ballantyne's map, Exhibit 5103. Zimmerman testified that even Hunt Oil used Bulletin 182 in creating their buyline on Exhibit 3121.

As for the Coteau area, Ballantyne appears to have done a sufficient amount of courthouse checking to formulate a reasonable guess as to where to lease.

The fact is that both of these areas were among the first areas of coal interest in the State of North Dakota. As a consequence, companies moved in early, established their buylines and blocked up the mineral acres, outlining the coal area to later purchasers.

The plaintiffs have failed to produce any evidence which would indicate the Ballantyne operation used confidential Hunt data in security the few leases they took in the Niobe-Coteau area.

D. Tioga.

Pan American leased over 21,000 acres in the Tioga area in a period stretching from October of 1972 to July of 1973. The majority of leases were taken after Pat Ballantyne received coal information from a representative of the Sun Oil Co. Approximately 15,666 acres were leased after the letter from Richard Jodry, Exhibit 5108N, reached Pat Ballantyne.

Both Hunt and Pan American recorded their first coal leases in this area early in October of 1972. According to Zimmerman, the Tioga region was drilled and logged by Hunt principally during the late summer and early fall of 1972.[31] Their leasing operations began soon thereafter. Bal-

[31] Plaintiffs also contend there was an earlier logging period during mid-1971.

lantyne also leased in October, but none of those leases were recorded until February of 1973. Only 5,562 acres were taken in this initial period.

The Hunts contend that Ballantyne's Tioga leasing activity was made on the basis of a map showing the Hunt drill holes and their interpretations. They concede that no buylines were available for this area at that time.

First of all, it is clear that Jodry did give Ballantyne coal information. On May 7, 1973, Jodry wrote Pat:

> "In accordance with out telephone conversation, I have checked the data we have in Williams County. It appears that lignite beds from 20-40′ in thickness may be expected in the area. My best estimate based on all of the data we have at present indicates that the thickest lignite may extend from Section 32, T156N, R95W, northeastward through Section 4, T156N, R95W. Actually, this entire township perhaps is all underlain by coal of more than 20′ in thickness. It would seem to me that a lease block covering this area along with your present acreage would be very attractive from the standpoint of a reserve for coal gasification. If you do succeed in getting a lease block in this area, I would certainly expect an opportunity of first refusal to purchase it." Exhibit 5108N.

The area referred to became the major area in which the Ballantynes purchased. Almost 75% of the Pan American leasing was done after receipt of this letter.

Jodry became acquainted with Pat Ballantyne through a Montana lease broker who was attempting to sell leases on Ballantyne's behalf. Jodry and another Sun Oil geologist, Richard Miller, who was described by Jodry as more knowledgeable concerning coal than he, concurred that Sun Oil was not interested in the particular leases Pan American had taken, although there was considerable interest in the general Tioga area. It had been one of the earliest oil

producing areas in North Dakota, and according to Jodry, there was published data available as well as various oil wells that had been drilled whose logs evidenced coal.

The "information" included in the May 7, 1973, letter was really an "estimate" by Jodry based on that available data. In addition, he testified that Zimmerman, who had previously been employed by Sun Oil, would certainly have been exposed to the same information.

The area in which the majority of Ballantyne leases fall is one where the Hunt drilling logs show no commercial coal. Both Reishus and Zimmerman testified that the logs northwest of the Hunt buyarea, (Exhibit 3122), showed clearly that this area did not show commercial coal. Nonetheless that is where the heaviest Ballantyne leasing took place. The amount of acreage outside of the Hunt buyarea is significant.

Pursuant to the Court's order filed January 10, 1974, the plaintiffs were to file their geological information. In response, the Hunts filed only logs "which show the presence of commercially minable coal." (Exhibit 6073). No logs were filed for the Tioga area in which Pan American concentrated its purchases.

The logs in this area appear to have become important only after Ballantyne is discovered to have purchased there.

The leasing by Ballantyne in October could not have been based on Sun Oil information. Neither can Pan American claim that it used the courthouse lease checking system. Instead, the earlier leasing was allegedly done based on observation of coal exploration activity within this area. Among the most active was Hunt. And based on the drilling operations of companies like Hunt, and discussions with the inhabitants of that area, the Ballantynes leased.

Plaintiffs argue that the list of observations made by Todd, Chuck, and Pat as they toured the Tioga area is clear proof that Pan American had Hunt data. Such a list

appears as Exhibit 5108A, and according to Hunts, "[a] notation on the third page of that list clearly indicates that the Ballantynes had with them a map showing Hunt drill holes." The notation is apparently one which states, in reference to a particular drill hole, "not numbered on map?". Chuck Ballantyne, who testified he probably made it, could not recollect its meaning. The inference does not arise that the "map" was a Hunt map.

Both Pat and Chuck made arrangements for the drilling of 4 holes in December of 1972, apparently unknown to each other. Both wrote checks (Exhibits 3180 and 3194), for cash to pay for the work. It was never done, allegedly because of icy roads. The plaintiffs pose these questions regarding this episode:

> "This drilling, they testified, was called off due to the weather although federal and state government agency reports (Exhibits P3202 and P3203) show that the weather was excellent on the day in question. The drilling was never performed. Why not? Who was to log the hole? Where was the logging machine to come from? Who was to interpret the logs secured?" *Hunt Post Trial Brief* at 13.

Whatever the reason, it is not direct, or even circumstantial, proof that confidential Hunt data was taken by the Ballantynes and used in their Tioga leasing.

The Court FINDS the Tioga area of purchase is inconsistent with the theory of access to Hunt geological information. Plaintiffs have failed to carry their "clear and convincing" burden to show Ballantyne leasing was based on Hunt information.

E. McKenzie County.

Pan American did not acquire much acreage in McKenzie County, nor did Hunt, who had designated three separate buyareas: Sheep Butte, Exhibit 3139; Johnson's Corner, Exhibit 3138; and N. W. Keene, Exhibit 3127. Reishus

testified the topography was very rough in McKenzie County, and although the area was mineable, it was not as desirable as others Hunts had designated.

The leases Pan American did take were allegedly taken based on courthouse checking of mineral leases. (Exhibit 5136-for comparison, see Eastwood maps 6046A, B, C). No evidence was produced by the Hunts to show that these leases were taken based on Hunt data.

It might be noted that some of the logs which Todd Ballantyne admitted taking were in McKenzie County. Their significance has been discussed, and they have no effect on the Court's finding.

E. McLean County.

In the materials turned over to the Court, pursuant to its January 10, 1974, order, Hunts designated two buyareas in McLean County; Roseglen (outlined on Exhibit 3140), and Garrison (outlined on Exhibit 3119). In all, Pan American leased approximately 5,430 acres in these two areas, the overwhelming majority of which was outside the Hunt outlines.

The Ballantynes allege their leasing was done following extensive checking of courthouse recordings. The Ballantyne maps, Exhibits 5109, 5110, 5112F, support such an assertion. Three maps made by William Eastwood during his participation in the Little Missouri Grasslands Study, Exhibits 6047A, B, C, are almost identical to the ones Pat Ballantyne alleges he constructed by using courthouse information. Pan American alleges they intended to lease in between the big coal companies; in this case, Wilhite and Hunt. Their purchases are consistent with that allegation.

On one of the maps prepared by Abshire, the consulting geologist for Mobil, he plotted eight logs in the heart of the Hunts' Roseglen buyline. Zimmerman testified that Hunt did some coring work in this area, based on the logs it took in this area. (He also testified that the Garrison area was one of intense competition, and Hunt hurried to establish

its buyline and begin leasing). The locations and the drill hole numbers on the Abshire map did correlate with Hunt logs.

The existence of the Abshire map does not negate the possibility that the Ballantynes did, in fact, obtain their leases in the manner which they claim. The clear and convincing burden placed on the Hunts is not met when a "reasonable explanation" exists after all the evidence is examined. The weight to be given the Abshire maps has been considered, and the evidence specifically relating to McLean County does not add anything.

G. Sawyer-Velva.

The Sawyer-Velva area was another which the Ballantynes did not use courthouse information in obtaining leases.[32] The leasing by Pan American was allegedly based on available Government information. Ballantyne purchased approximately 32,000 mineral acres, with a considerable majority of the leases falling outside of the Hunt buylines in areas that were considered by Hunt geologists as noncommercial.

The Hunt buylines are shown in Exhibit 3123, which is designated as the Velva area, and Exhibit 3124, the South Prairie buyarea. The buyline which Pat Ballantyne alleges he made from known Government data is shown on Exhibit 5114.

It is alleged by Hunts that the Ballantyne buyarea was, in fact, constructed from confidential Hunt data.

Pat Ballantyne testified that he secured his information from public government information; Bulletin 182 (Exhibit 5131A), and Bulletin 906 (Exhibit 5131B). He testified he specifically used two maps from Bulletin 906, one a geologi-

[32] The record indicates that Hunts conducted their logging operation in the Velva area in July and August of 1972. They leased to a very limited extent up to the summer of 1973. See Exhibits 936-978. Zimmerman testified that Hunt considered Velva a lesser target area.

cal map of the Minot region (Exhibit 5113), and the other, a map of north central North Dakota showing pheistocene features of the Minot region and their relation to the surrounding region. (Exhibit 5116A). Two other maps from Bulletin 182 were also used. (Exhibit 5116E 5116F). They show, among other things, that there were also some "known" mining areas in Ward County.

The Government data does not purport to outline a coal field, but the information it does give may have been sufficient to allow Pat Ballantyne to "guess" at its location. That was his style. It shows an outcrop (or as Pat called it, "a clinker line"), running northwest to southeast from which, according to Hunt, "even the uninitiated could determine a northeast line of possible economic production". Bulletin 906 describes an area south of this line which, when adequately prospected, should show considerable coal. It gives even more specific details such as the elevation above sea level, at which this bed occurs and where it would outcrop or terminate because of conjunction of the coal bed with the surface of the ground. The Ballantyne method was not claimed to be scientific. The information in the government data may have been sufficient for Ballantyne in his method of operation to create a general buy outline.

The purchases that Pan American made, for the most part, do fall within Pat Ballantyne's outline. That same outline excludes about half of Hunts' South Prairie buyarea. The Ballantyne purchases are consistent with the general information given by the government data. They seem to be inconsistent with parts of the Hunt outlines which extend out of the area delineated by the government bulletin. Where the government area and the Hunt area overlap, Ballantyne leased. But where the government area and Hunt area separate, the Ballantynes did not lease in the Hunt area. It would be logical to conclude Ballantynes were guided by government information.

Pat Ballantyne further depended on water well drilling information he obtained from the State. He contends he

used this public information to determine the southern end of his buyarea. That this information was available was not contested.

The Wilhite logs were also alleged to be from this area. The evidence is clear that they were not Hunt logs nor did they give accurate geological data in Ward County. Nonetheless, they did fit the purpose for which Pat Ballantyne obtained them. They did not affect the Pan American leasing in any respect in the Velva-Sawyer area.

The Ward County area was referred to by several names at trial, including Velva-Sawyer and South Prairie-Velva. The plaintiffs make the following observation regarding the Ballantyne's reference to the area:

> "Perhaps even more telling, however, is the fact that, athough the buy line which Pan American says it used is all one area, referred to in Pat's testimony exclusively as Sawyer, the leasing records of Pan American refer to 'South Prairie'. Why would Pan American have referred to South Prairie leases when it had no area by that name? The answer is, again, simple: The Hunts did have an area by that name, and Pan American had the Hunt's information." *Hunt Post Trial Brief* at 15-16.

Recognizing the number of areas and the various names attached to them, the fact that Pat Ballantyne may have used a different name for the Velva-Sawyer area before and during the trial has little significance.

The Court FINDS the information allegedly relied upon by Ballantyne for his purchases in the Minot region is consistent with the purchases Pan American made. The plaintiffs have failed to prove that the leases were obtained by the use of confidential Hunt information.

H. Stark County.

In the Dunn and Stark County area, the Hunts had designated three separate buylines. The first was labeled the Dickinson Buy Area, and was primarily contained in Stark

County (Exhibit 3134, 3137). A large part of that area was described in Bulletin 182. (See Figure 15, Exhibit 5131A and accompanying test). The second and third areas were wholly within Dunn County and were named the Windmill, (Exhibit 3132), and Deep Creek areas (Exhibit 3118).

Aside from the government data, Pan American compiled information by checking the courthouse records of the two counties. The result of that work is recorded in Exhibit 5117 (Dunn County), and Exhibits 5118, 5138 (Stark County).[33] Pat Ballantyne testified that he was well acquainted with Dunn County farmers, that most farmers knew from water well experience whether coal was under their land, and that he obtained this information by visiting with farmers.

H-1. Dickinson.

Some of the logs Todd Ballantyne admitted taking came from the Dickinson area, (Exhibits 3188, 3189). A Ballantyne farm, Hanel, was also in the general area. The importance of these logs has been discussed. There is no other evidence to show confidential Hunt information was used in obtaining the few leases Ballantynes purchased. In fact, none of the leases taken fall within the Hunt portion of the Dickinson outline.

H-2. Windmill.

In Dunn County, there was a tremendous amount of leasing competition taking place in 1972 and 1973. So much so that Pat Ballantyne found it necessary to pay $15.00 per acre to obtain leases during the spring of 1973. A number of the leases taken in this area by Pan American expired prior to the time Ballantyne was able to sell the rest to Mobil.[34]

The Windmill area was the background area for Todd Ballantyne's set of "bogus" logs, (Exhibits 4000-4124). The principal Abshire map, (Exhibit 3205), plotted the "bogus"

[33] See also worksheets for Stark County (Exhibits 5139A, B, C, D), and those for Dunn County (5125E, H).

[34] Exhibit 5034A shows a number of those leases.

logs on a Dunn County highway map. The plaintiffs have argued that the existence of the Abshire map is sufficient proof that the leases taken in the Windmill area were taken based on confidential Hunt data. That theory has previously been explored in the section entitled "The Abshire Maps".

H-3. Deep Creek.

The discussion regarding the Abshire map is also applicable to Hunt's theory regarding the Deep Creek buyarea. This area lies southeast of the Windmill area, and some of the points plotted by Abshire fall within the Deep Creek buyline. Some of these locations had been drilled several months before Todd Ballantyne began his employment with Hunt. In that regard, it must be remembered that some of the locations Todd placed on the "bogus" logs were locations that Chuck and Pat obtained by searching out the countryside some time in the fall of 1972. It was not logs that Abshire was plotting, it was locations, and Hunt has failed to show by clear and convincing evidence that Hunt logs were used in the Ballantyne lease activity.

The Ballantyne outline in the Deep Creek area ran far north of the Hunt outline; however, the leases taken by Pan American were near or in the Hunt area. Wilhite had leased extensively in the area north of the Hunt buyline, (See Exhibit 5117), which is apparently the reason why the Ballantyne buyarea extended so far north, (See Exhibit 5031). Hunt, on the other hand, was the heaviest lessor in the southern part of the Ballantyne outline, (See Exhibit 5117, and Eastwood Map 6048B). The plaintiffs allege this is evidence that Ballantyne did have Hunt confidential information. The Court is not persuaded that the fact Pan American leased in the southern part of its buyline, rather than in the north, has any significance.

The Court FINDS that the plaintiffs have failed to show that Pan American used confidential Hunt information in the procurement of their leases in the Stark and Dunn County areas.

I and J. New England-Regent-Leith.

This is an area primarily in Hettinger County with part of Leith extending into Grant County. The Hunts have designated two buylines; New England-Regent, (Exhibit 3131), and Elgin, (Exhibit 3125, Leith).

The Ballantynes allegedly created their buylines by following the lease play in the county courthouse, (Exhibit 5120). The buyline is remarkably similar to that of the Hunts. However, the map that Pat Ballantyne created is almost identical to one William Eastwood made during his work with the Grasslands Study, (Exhibit 6045). From that information, not only could Pat Ballantyne guess at a place to lease, but he could be fairly certain that it would be coal bearing acreage. It is also worth noting that the Hunts were not the major company which Ballantyne followed in this area. Both Lignite Power Electric and Knife River Coal Company leased to a much greater extent than Hunt.

It is not significant Pan American leases are found within buylines constructed by Hunt Oil. There is no evidence to show confidential Hunt data was used to obtain those leases.

K. New Salem-Glen Ullin.

Hunt's buylines for the New Salem-Glen Ullin area appear on Exhibits 3135 and 3136. The buyline created by Pat Ballantyne is recorded on Exhibits 5027 and 5028, and the contours which appear because of Pat's crossing out leased sections appears quite similar to the outlines on 3125 and 3126. Eastwood also made maps of this area, (Exhibits 6052, and 6053A, B), and they record approximately the same information as Exhibits 5027 and 5028.

Once again, Pan American could lease with reasonable assurance it was obtaining good coal land. The Ballantynes followed not only Hunt in this area, but Carmago, who had leased heavily.

The Frosaker maps involving Morton County have already been discussed. The plaintiffs have failed to prove that Hunt

information was used by Pan American to acquire leases in this area.

CONCLUSIONS AND ORDER FOR JUDGMENT

After a careful consideration of the mass of evidence presented in this case, the Court is left with a distinct impression that it was not beyond the propensity of Pan American Energy, Inc., or its principals, to have, in fact, sought to obtain confidential geophysical information belonging to the plaintiffs, and to have used that information for the purpose of securing coal leases.

However, the law places a heavy burden on the plaintiffs, requiring them to prove their allegations by clear and convincing evidence so as to leave no substantial doubt in the mind of the trier of facts. The Court is further impressed with the thorough investigation and preparation for trial carried on by the plaintiffs in their efforts to meet the burden.

Those extensive efforts failed to uncover substantial clear and convincing direct or circumstantial evidence of such wrongdoing sufficient for the Court to find that Pan American Energy, Inc., coal leases were obtained by the use of confidential Hunt information. If Ballantyne did, in fact have such information, he made poor use of the intelligence, because the substantial majority of the Pan American coal leases missed the Hunt buyareas.

IT IS ORDERED that judgment be entered for the dismissal of the action.

Dated this 18th day of August, 1975.

PAUL BENSON

Paul Benson, *Chief Judge*
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH DISTRICT

No. 76-1015

NELSON BUNKER HUNT AND WILLIAM HERBERT HUNT,
Appellants,

v.

PAN AMERICAN ENERGY, INC., a North Dakota corporation;
MOBIL OIL CORPORATION, a New York corporation;
and MELVIN "PAT" BALLANTYNE,
Appellees.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA.

Submitted: May 14, 1976
Filed: August 2, 1976

Before HEANEY and HENLEY, Circuit Judges, and SCHATZ, District Judge.*

HEANEY, Circuit Judge.

William Herbert Hunt and Nelson Bunker Hunt appeal from an order of the United States District Court for the District of North Dakota, issued after trial to the court on

* ALBERT G. SCHATZ, District Judge, District of Nebraska, sitting by designation.

the issue of liability, dismissing their action against Pan American Energy, Inc., a North Dakota corporation, Melvin Ballantyne, the president of Pan American, and Mobil Oil Corporation, a New York corporation. Jurisdiction was based on diversity of citizenship. 28 U.S.C. § 1332(a). The Hunts alleged that Pan American and its president wrongfully possessed and used confidential Hunt geophysical information to purchase coal leases in North Dakota and prayed alternatively for the imposition of an implied or constructive trust or money damages. They also sought a constructive trust over whatever coal leases Mobil Oil had acquired from Pan American or Melvin Ballantyne. The allegations were generally denied with Mobil Oil asserting the defense that it was a good faith purchaser for valuable consideration. The District Court held that the Hunts failed to meet their burden of proof. We affirm. The District Court correctly applied the applicable North Dakota law to factual findings that are not clearly erroneous.

I.

Extensive coal exploration and leasing began in western North Dakota in 1971. The Hunts, through the Hunt Oil Company, began their program of exploration and leasing in the summer or early fall of that year. They proceeded in a scientific and deliberate manner.

Initially, Hunt geologists studied all of the available published information on the coal resources of North Dakota. An independent coal exploration program was then instituted to find and delineate the areas that contained commercial coal. The determination of what coal beds were mineable was made by Hunt geologists who used predetermined parameters of, *inter alia*, seam thickness, amount of overburden, availability of transportation facilities and proximity of water supplies. The operation was directed and controlled from the Hunts' Dallas, Texas, headquarters.

Contract drillers were employed to take test samples at locations specified by Hunt representatives. To this end,

mobile drilling rigs drilled holes two hundred feet in depth and samples of the cuttings for each five-foot interval were laid on the ground for observation. This drilling activity was observable by anyone in the vicinity.

Loggers, employed directly by the Hunts, followed the drilling crews. They observed the cutting samples that had been laid on the ground and electronically logged the hole. A hole was electronically logged by recording in graph form the pattern of gammaray emissions that resulted when a sonde, which had been dropped to the bottom of the hole, was reeled up. The location, designated by legal description, and an identification number for the drill hole were noted on the face of each log by the logger. The identification number consisted of an alphabetical prefix to Arabic numerals. The same information was noted on a legal pad with the logger's visual observation of the cutting samples. Finally, a map of the area that showed the locations and identification numbers for the holes previously drilled was updated. The area map permitted a logging crew to follow a number of drilling crews and ensured, in theory, that there would not be a duplication of identification numbers.

The original logs along with the descriptions of the logger's visual observations were delivered by each logger to the Hunt geologists. Delivery was made either by mailing the logs and descriptions on a daily or near daily basis directly to Dallas or by giving the material directly to a Hunt geologist at the North Dakota headquarters located in Williston. In the latter case, the geologist would summarily process the data before sending it to Dallas.

Todd Ballantyne, a son of Melvin Ballantyne, was employed by the Hunts as a logger from October 23, 1972, to December 22, 1972. During that period, Mark Reishus, a Hunt geologist, was usually stationed at the Williston office. Reishus is a friend and former employee of Melvin Ballantyne.

Core samples of the coal seams were also taken at the direction of Hunt geologists. The analysis of the core samples

provided information as to the quality of the coal seams. Copies of the logs for those drill holes from which the core samples were to be taken were returned from the Dallas to the North Dakota office. Todd Ballantyne took core samples while employed by the Hunts.

From the data collected, the Hunt geologists determined the areas that contained commercial coal from which leases were to be taken. Maps were prepared delineating these areas, for the Hunt landmen who purchased the desired coal leases. Copies of these buy area maps were always kept at the Hunts' North Dakota office.

This scenerio of data collection to lease purchase was altered occasionally because of the dynamic environment in which the coal exploratory program was operating. When a log denoted a particularly thick seam of coal, a tentative buy area was immediately established and leases were taken while the final outline of the buy area was determined.

During the period of the Hunts' coal exploration and leasing program, from mid-1972 to early 1973, approximately 2,200 test holes were drilled at a cost of $385,000, and approximately twenty-two buy areas were established. The total Hunt investment, including the cost of the leases acquired and the salaries of geologists and landmen, was $1,178,818.

Melvin Ballantyne also became interested in the coal resources of his home state, North Dakota, in the fall of 1971. Pan American Energy, Inc., was organized as the vehicle through which coal leases would be purchased. Other persons and beneficial owners of the leases taken by Pan American are Melvin's brothers, Russell and Charles, and the Ballantyne Family Trust. The Ballantynes' method of operation contrasted sharply with that of the Hunts. No geologists were employed. They gathered the information necessary to determine the areas in which they desired to purchase coal leases from available publications on the coal resources of North Dakota, from visual observation of where other companies were drilling, from the recorded coal leases in

the county courthouses showing where other companies were buying and from conversation with farmers in areas generally considered to contain coal. Charles was the field man for the operation. He compiled the data from the recorded leases and watched the activities of the other companies. Melvin would plot the data furnished by Charles on maps and determine the areas in which leases were to be taken. Copies of the maps were then given to Charles who directed the landmen. During much of the time at issue, Melvin resided at his winter home in Palm Springs, California. The Ballantynes purchased leases from October, 1972, until the spring of 1973. The first leases were not recorded, however, until February, 1973. Their purpose was to acquire large blocks of leases for sale to major coal companies. After negotiations, which began in June, 1973; the Ballantynes entered into a purchase agreement with Mobil Oil on July 2, 1973. Under the agreement, Mobil Oil took all of the Ballantyne leases subject to the right to return any particular lease.

The Hunts first noticed the competition of the Ballantynes in February, 1973, and suspected that the latter were benefiting from the use of their confidential geophysical data. Efforts were made by the Hunts to substantiate their suspicions, and Mobil Oil was contacted directly in September, 1973, to determine what data it had received from the Ballantynes. Gene Hixon, Mobil Oil's exploration manager for oil shale and oil in North America, was asked to compare a copy of a Hunt log to the materials received from the Ballantynes and was requested to permit the Hunt representative, Jim Beavers, to examine those materials. On advice of Mobil Oil's counsel, that request was denied. The Hunts were unwilling to seek direct permission from Melvin Ballantyne, who, upon request, obtained the return of his materials from Mobil Oil. The Hunts filed suit in October, 1973.

The Hunts' case for the imposition of a constructive trust over the Ballantyne leases is premised on the theory that Todd Ballantyne or Mark Reishus, or both, passed confidential Hunt geophysical information to the principals

of Pan American who used that information to purchase leases.[1] North Dakota law controls:

> An implied trust arises in the following cases:
>
> * * * *
>
> 2. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an implied trustee of the thing gained for the benefit of the person who would otherwise have had it [.]

N.D.C.C. 59-01-06.

We, like the District Court, do not interpret the statute to require a showing that the wrongfully appropriated data was the exclusive basis for the Ballantyne purchases. Indeed, it is not contended otherwise. The Ballantynes have premised their case on the proposition that they did not use confidential Hunt geophysical information. Having admitted of no unlawful use, they have not presented the strong evidence necessary to show that particular leases were purchased innocently, thereby exculpating those leases from the imposition of a constructive trust should the Hunts prevail. *See Hunter v. Shell Oil Co.*, 198 F. 2d 485, 490 (5th Cir. 1952). Our review of the record facts is made in that light: a constructive trust is warranted under North Dakota law if the evidence shows that the Ballantynes used Hunt geophysical information to purchase leases.

But there must be that causal connection. The Ballantynes can be constructive trustees of only those leases gained by the wrongful act. *Bodding v. Herman*, 76 N.D. 324, 35 N.W. 2d 561, 563 (1949); N.D.C.C. 59-01-06. *See E. W. Bliss Company v. Struthers-Dunn, Inc.*, 408 F. 2d 1108, 1112 (8th Cir., 1969); *Pratt v. Shell Petroleum Corporation*, 100 F. 2d 833, 836 (10th Cir. 1938), *cert. denied*, 306 U.S. 659 (1939). Proof of unlawful use of Hunt data in one area is not proof as to all areas. There is no basis to conclude that such was or could be the case. Geophysical data from one area of North Dakota did not provide information of the coal resources in another area of the state.

The causal connection is between the use of Hunt data for a particular area and the leases taken for that area. The District Court cited with approval *Hunter v. Shell Oil Co., supra* at 490:

> It is unnecessary that plaintiff establish every transaction with separate, independent and isolated proof of the influence and effect of Hunter's information upon that particular transaction viewed *in vacuo*. It is enough that the circumstances, taken as a whole, constitute clear, convincing and trustworthy proof as to each tract.

It analyzed the proof as it related to each "tract," or in the terminology of the parties, each Hunt buy area. This was proper.

To prevail, the Hunts must show that the Ballantynes purchased coal leases in a particular area on the basis of Hunt geophysical information by clear and convincing proof. The moving party "bears a heavy evidentiary burden." *Scheid v. Scheid*, 239 N.W. 2d 833, 838 (N.D. 1976). As stated in the state's leading case:

> The evidence to establish an implied trust, however, must be clear and convincing. There must be a satis-

[1] The Ballantynes concede that they possessed Hunt information that was not geophysical in nature. They received from Todd a listing of the Hunt drill hole locations and claim that they also possessed the identification numbers for those locations. The Ballantynes claim that Todd did not give them the data until after they had purchased their leases, and that the data was used only to promote their sale to Mobil Oil.

Whether possession by the Ballantynes of Hunt drill hole locations and identification numbers, assuming their use in the purchasing of leases, would support the imposition of a constructive trust under North Dakota law is an issue we need not decide. The Hunts' complaint and the trial to the court below did not encompass this theory. It cannot be asserted for the first time on appeal. *Katsev v. Coleman*, 530 F.2d 176, 180 (8th Cir. 1976).

factory showing of a wrongful detention of the property, or fraud, undue influence, the violation of a trust, or other wrongful act by virtue of which the party is holding title to property which he should not hold under the rules of equity and good conscience. The evidence must be strong enough to lead to but one conclusion. If the evidence is doubtful or capable of reasonable explanation upon theories other than the existence of a trust it is not sufficient to establish a trust.

Bodding v. Herman, supra at 563. *See also Kutchera v. Kutchera*, 189 N.W. 2d 680, 687 (N.D. 1971); *Sprenger v. Sprenger*, 146 N.W. 2d 36, 42 (N.D. 1966).

While the evidentiary burden is onerous, it does not deny the Hunts the reasonable inferences from the facts proved. Circumstantial evidence is no less probative than direct evidence. Moreover, an innocent circumstance may take on a different light when the evidence is viewed in its entirety. *Hunter v. Shell Oil Co., supra* at 490. We repeat the directive of *United States of America v. Empire Gas Corporation*, No. 75-1492, slip op. 3 (8th Cir. May 28, 1976), which is equally applicable here:

> We have stressed the importance of viewing the evidence as a whole to give the antitrust plaintiff the full benefit of his proof, rather than tightly compartmentalizing the case and wiping the slate clean after considering each piece of evidence.

But we not sit to try cases *de novo*. The scope of review is limited by the clearly erroneous rule. F. R. Civ. P. 52(a). The issue is not whether we would have made the same findings as the District Court but whether, after reviewing the entire evidence, we are left with a firm and definite conviction that a mistake has been made. The burden is upon the Hunts to clearly demonstrate error. *Lindsay v. McDonnell Douglas Aircraft Corporation*, 485 F. 2d 1288, 1289 (8th

Cir. 1973) (per curiam); *St. Louis Typographical Union No. 8 v. Herald Company*, 402 F. 2d 553, 557-558 (8th Cir. 1968).

III.

The District Court's unreported memorandum of decision and order evidences a thorough and evenhanded consideration of the evidence presented by the parties. It said in conclusion:

> After a careful consideration of the mass of evidence presented in this case, the Court is left with a distinct impression that it was not beyond the propensity of Pan American Energy, Inc., or its principals, to have, in fact, sought to obtain confidential geophysical information belonging to the plaintiffs, and to have used that information for the purpose of securing coal leases.
>
> However, the law places a heavy burden on the plaintiffs, requiring them to prove their allegations by clear and convincing evidence so as to leave no substantial doubt in the mind of the trier of facts. The Court is further impressed with the thorough investigation and preparation for trial carried on by the plaintiffs in their efforts to meet the burden.
>
> Those extensive efforts failed to uncover substantial clear and convincing direct or circumstantial evidence of such wrongdoing sufficient for the Court to find that Pan American Energy, Inc., coal leases were obtained by the use of confidential Hunt information.

The District Court viewed the Ballantynes for what they were: promoters of questionable integrity. In the light of this observation, which is fully supported by the record, we cannot conclude that the court accorded the Ballantynes' testimony undue weight. *See Snodgrass v. Nelson*, 503 F. 2d 94, 96 (8th Cir. 1974) (per curiam). The ultimate issue was not whether the Ballantynes' purported method of operation

was the method used in fact but whether the Hunts' allegations were proved by clear and convincing evidence. It is the failure to prove the latter which the District Court found dispositive. It said:

> What the Ballantynes "needed" for their leasing operation and whether the data they purportedly had was sufficient to make reasonable judgments is debatable, but the fact that it is debatable causes the proof to fall short of meeting the required clear and convincing standard for this Court to find that the leases were obtained through the use of confidential Hunt information. To prove the nonfeasibility of a purported method operation is not sufficient. The required proof goes one step further, and the plaintiffs have failed on that step.

We similarly view the Ballantynes' explanation of the facts with skepticism.

A.

Before examining the evidence that relates specifically to the Ballantyne purchases of coal leases in specific areas, we review the evidence that relates generally to the question of whether the Ballantynes used confidential Hunt data.

1. Todd Ballantyne.

Melvin Ballantyne's son Todd was employed by the Hunts from October 23, 1972, to December 22, 1972. Todd was hired by Mark Reishus after consultation with D. A. Zimmerman, the other principal Hunt geologist in North Dakota. Todd, a college student, was available for employment during that period because he was temporarily suspended from school because of poor grades.

It is a significant coincidence not mentioned by the District Court, that Todd began his employment with the Hunts at the time that Melvin purchased his first coal

leases. The latter's active involvement in that activity was concealed from the Hunts, although Zimmerman knew that Melvin had the potential to enter the coal leasing business. Had Zimmerman or Reishus known of the Ballantynes' actual interest, Todd would not have been hired.

This coincidence must, however, be viewed along with other facts. The District Court was correct in concluding that the opportunity for Todd to acquire confidential Hunt logs was minimal. Except for the very few logs returned to the Hunts' North Dakota office, all of the logs, originals and copies, were kept at the Dallas office. The logs were delivered directly to Dallas by each logger or by a Hunt geologist.

But while the opportunity was minimal, the evidence does not warrant the inference that Todd could not have acquired at least some of the Hunt logs. Of course, Todd had access to those logs which he made. Indeed, he admitted retaining copies of fourteen such logs as souvenirs of his employment. Four of those logs were from an area near his father's farm. In addition, Todd made interpretations, however rough, of six other logs from the same area. These copies were made on the Hunts' copying machine in North Dakota and on a commercial copying machine outside the office. None of the logs showed commercial coal. Of all of the Hunt logs that were made during Todd's employment, only sixty-four showed coal deposits. The logs that did not show commercial coal were valuable only in that they disclosed where not to purchase leases.

The District Court was clearly erroneous in its conclusion that Todd had only a minimal opportunity to acquire Hunt buy area maps. The evidence is undisputed that copies of these maps were always kept at the North Dakota office.

We do, however, agree with the District Court that this evidence alone is not clear and convincing proof that the Ballantynes used confidential Hunt information to purchase

coal leases. Todd worked in only four of the twelve counties where the Ballantynes are alleged to have wrongfully purchased leases and his access to the logs of others was very limited. Moreover, the evidence was that Todd did not show his father the Hunt information he retained until after the Ballantyne leases were purchased in June, 1973, for the purpose of promoting their sale.

2. Mark Reishus.

The Hunts also allege that Mark Reishus passed their confidential data to the Ballantynes. Reishus was a friend of the Ballantynes since his youth, he received financial help from them for his college education and was employed by them as a geologist after he received his degree. The Hunts do not rely solely on this personal friendship to prove their allegation.

In the fall of 1973, Melvin Ballantyne gave Reishus two checks totaling $4,000. The first check was made for $2,500 and the second check was made for $1,500. Reishus testified that the transaction was a loan made necessary because of his personal financial difficulties. Melvin's testimony was to the same effect, and his books, prepared by an accountant, substantiated the loan nature of the transaction. The Hunts dispute this characterization of the transaction because no promissory notes were given when the checks were issued and because Reishus did not admit, when first questioned by a Hunt private detective, to the receipt of the second check.

Reishus attributed his failure to be candid when first questioned to his fear of losing his job. He denied that he gave the Ballantynes any confidential Hunt information. The District Court, which had the opportunity to observe the demeanor of the witness, accepted the explanation of the transaction and the denial of wrongdoing. It found Reishus' testimony to be forthright and credible. This finding was corroborated by the fact that Reishus passed a polygraph examination conducted at the direction of the Hunts.

Weight was also placed upon the fact that Reishus did not leave the Hunts' employ until some months after the suit was initiated.

The Hunts challenge the District Court's acceptance of Reishus' testimony on the basis of the testimony of Bruce Alfson, an independent lease broker from Williston, North Dakota. Alfson testified that Charles Ballantyne told him that Pan American received all of its coal information from Reishus. Charles denied the statement.

The District Court disbelieved Alfson. The statement by Charles was allegedly made in December, 1972, at Charles' Minot, North Dakota, office. It was the first time that the two men had met, and the meeting was for the purpose of discussing oil and gas, not coal, leases. It was a most improbable occasion for Charles to admit to unlawful activity.

Alfson first relayed his conversation with Charles to Ray Kemmis, a former district landman for the Hunts and a personal friend. Kemmis, like Alfson, officed in Williston. Yet, while Alfson thought the matter was important, he did not disclose it for some time. Alfson stated that he told Kemmis of the conversation within two or three months. The latter stated that he first heard of the matter from Alfson after the Hunts had initiated suit, some ten months from the time of the conversation. In any event, Alfson's account of the conversation to Kemmis was not the same as his testimony at trial. According to Kemmis, Olfson, after meeting with Charles, had only the feeling that somehow the Ballantynes had access to Hunt information.

The District Court properly discounted the probative force of the Alfson testimony. It was not in error when it concluded that the evidence was not clear and convincing that the Ballantynes received Hunt geophysical information from Reishus. Moreover, we are of the opinion that the evidence presented to implicate Reishus in the allegedly unlawful scheme of the Ballantynes has little, if any, probative force when the record is considered in its entirety.

B.

The Ballantyne leases in approximately twelve counties of western North Dakota that are in or near approximately fifteen of the Hunt buy areas are alleged to have been purchased with the use of Hunt geophysical information. We turn first to those buy areas where the proof clearly fails to substantiate the allegation.

1. Niobe-Coteau.

The Ballantynes purchased seven leases totaling 4,122 acres in Burke County near the Hunts' Niobe-Coteau buy area. The District Court found that these leases were purchased on the basis of information derived from a government bulletin and from courthouse records that disclosed where the major companies were purchasing. It stated that no evidence was presented to indicate the use of confidential Hunt data. The Hunts do not seriously challenge these findings. They are not clearly erroneous.

2. Sheep Butte, Johnson's Corner and N. W. Keene.

The Hunts had three buy areas in McKenzie County known as the Sheep Butte, Johnson's Corner and N. W. Keene areas. Again, the District Court found that there was no evidence to support the conclusion that the Ballantyne leases were wrongfully purchased. This finding is disputed by the Hunts only as to the leases from the Sheep Butte area.

Todd Ballantyne first worked for the Hunts in McKenzie County, and three of the logs he admittedly kept as souvenirs were from the Sheep Butte area. The Hunts stated without elaboration that this admitted possession of Hunt data should be sufficient to warrant the imposition of a constructive trust.

The three logs kept by Todd do not show the presence of commercial quantities of coal. They were of value only insofar as they disclosed where not to buy. But we cannot

infer, in the absence of any additional evidence, that the possession of such a limited quantity of negative information could be a reasonable basis upon which to extrapolate where to buy valuable coal leases. Further, Todd testified that these logs were given to and used by his father only for promotional purposes in the sale of the leases to Mobil Oil. As will be discussed in detail *infra*, Melvin was of the opinion that a "thick file" was needed to impress his prospective purchasers and to interest them into negotiation. The District Court's finding that the Ballantyne leases in this county were not purchased with the use of Hunt information is not clearly erroneous.

3. Dickinson.

The major portion of the Dickinson buy area is in Stark County with portions extending into Billings and Dunn Counties. The area is known for its rich coal reserves and was the scene of active leasing by many companies. The Ballantynes first purchased leases in the area in the spring and summer of 1973.

The only evidence tending to support the Hunts' allegation that the Ballantynes used Hunt information in these purchases is the fact that Todd kept eleven logs relating to this area and made interpretations of six others. Seven of the logs were from Stark County, although their exact locations were not shown on the face of the logs or known by Todd. The remaining four logs and the six attempted interpretations were from Dunn County near Melvin Ballantyne's farm. None of the logs showed commercial quantities of coal. For the reasons stated in the discussion of the Sheep Butte buy area, we cannot say that the District Court was clearly erroneous in finding against the Hunts.

4. New England — Regent and Elgin.

The New England — Regent and Elgin buy areas are in Hettinger County with the latter buy area extending into Grant County. The District Court found that the Ballan-

tynes purchased coal leases in and near these areas principally because of the purchasing activities of companies other than the Hunts. Under the evidence presented, the fact that the Ballantyne eases were within the Hunt buy areas and between Hunt drill hole locations is merely coincidental. The coincidence alone is not clear and convincing proof of the use of Hunt information. The District Court's findings are not clearly erroneous.

5. Garrison.

The Garrison buy area as well as the Roseglen buy area are in McLean County. While the Ballantynes' method of purchasing for each area was put in issue below, the Hunts' challenge the District Court's factual findings only as they relate to the latter area. Whether the evidence warrants the imposition of a constructive trust over the Ballantyne leases near the Roseglen area will be discussed *infra*.

6. Sawyer-Velva.

The Ballantynes' largest block of coal leases, approximately 32,000 acres, was taken in and within approximately five miles of the Hunts' Sawyer-Velva buy area in Ward County. Many, if not most, of the Ballantyne leases were taken outside of the area that the Hunts considered commercially viable.

Melvin Ballantyne testified that the leases in this area were purchased on the basis of information derived from two publications of the federal government and from water well drilling information obtained from the state. The District Court found that this information did not outline a coal field but did provide a reasonable basis for Melvin to "guess" the location of coal. It found this method of decision making to be consistent with Melvin's mode of operation, and it further found the Ballantyne leasing pattern to be more consistent with the government data than with the Hunt buy area.

The Hunts do not seriously challenge these findings. They point to no positive evidence in the record, either of a direct or circumstantial nature, that supports the proposition that the Ballantynes used Hunt data in this area. Instead, they argue that because the Ballantynes would have used Hunt data if the opportunity to do so arose and because the information that the Ballantynes admittedly used was extremely imprecise, the Ballantynes must have had Hunt data or they would not have purchased this large quantity of leases. We, like the District Court, do not consider argument to be clear and convincing proof. The District Court's findings are not clearly erroneous.

7. Tioga.

The Ballantyne leases for the Tioga area, located in Williams and Mountrail Counties, totaled more than 21,000 acres. The great majority of those leases, representing approximately 15,666 acres, were purchased after receipt of a letter from Richard Jodry of the Sun Oil Company that detailed the area's coal resources. The failure of the District Court to impose a constructive trust over these leases is not challenged.

The Hunts' attack on the District Court's ultimate finding of no liability is directed at the Ballantynes' early purchases, beginning in October, 1972, that encompass approximately 5,562 acres. The Ballantynes did not record these early leases until February, 1973.

The Ballantynes stated that these early leases were purchased because of the observed drilling activities of the Hunts and other companies, including notation of the cutting samples left on the ground, and from information acquired from conversations with the local farmers. The area was known for its oil reserves.

The Hunts would have us conclude, on the basis of a notation made by Charles Ballantyne on a list of observations, that the Ballantynes used Hunt data. The notation, which was made in apparent reference to a particular drill

hole, was: "not numbered on map?". Charles could not remember the significance of the notation. The District Court was not willing to infer from the reference to a map that the Ballantynes possessed a Hunt map.

The early Ballantyne leases in the Tioga area that were purchased before the receipt of the Sun Oil information were also purchased before Todd started his employment with the Hunts. Todd, then, was not a likely source from which the Ballantynes could acquire a Hunt map. Moreover, at the time in issue, the Hunts had not established a buy area map for the Tioga area. Finally, Reishus is not a likely source by which the Ballantynes could have acquired a Hunt map, for if that were the case, it is unlikely that the Ballantynes would have purchased those leases which are outside of the area of commercial coal. We agree with the District Court that the evidence does not warrant the inference that the Ballantynes had a Hunt map. Moreover, were we convinced to the contrary, there would be no basis upon which to further conclude that the Hunt map contained geophysical information. At the most, the map would have disclosed the location of drilling points and their assigned identification numbers. The Hunts have not alleged that the use of that information warrants the imposition of a constructive trust. *See* note 1, *supra*.

C.

The Ballantynes purchased coal leases in or near five Hunt buy areas yet to be discussed. The evidence of wrongful conduct in these areas centers on what has been termed the Frosaker maps and Abshire maps controversies. This evidence presents a closer question of whether the District Court erred in not finding liability.

1. Frosaker Maps.

The evidence relating to the Frosaker maps concerns the Ballantyne leases in or near the following Hunt buy areas: Windmill in Dunn County, Hanks-Grenora in Williams County and New Salem-Glen Ullin in Morton County.

These maps are buy area maps made by Robert Frosaker. Of critical importance are the lines denoting the perimeter of the buy area referred to as the buy lines. The Hunts contend that the Frosaker maps represent the true Ballantyne buy areas, and that these buy areas were established with the use of Hunt confidential information. The contention is premised on the similarity between the buy lines on the Frosaker maps and the Hunt maps. The corollary to their contention is that the Ballantyne buy area maps submitted into evidence, which were made from the information gathered by observing the drilling activities of other companies, from government publication and from records of other companies' coal leases, are fraudulent.

Robert Frosaker was a landman. He was employed by the Ballantynes from February, 1973, to the fall of 1973 and was paid by a commission on the acres he leased. From the fall of 1973 to early 1974, he was employed by Mobil Oil and from early 1974 to October, 1974, he was employed by J. R. Sweeney, a lease holder from Chicago, Illinois. Frosaker's leasing activities for Mobil Oil were limited to Ward County, and his buy area maps for that area are not in issue. Frosaker's leasing activities for Sweeney are in issue.

Sweeney purchased coal leases in the same manner as the Ballantynes, by following the lead of the major companies. He engaged the Ballantyne landmen because he found that local people had greater success in securing coal leases. Approximately eighty percent of Sweeney's leases were purchased by Frosaker. These leases were taken in Williams and Dunn Counties. Thus, while Frosaker received all of his directions from the Ballantynes, the latter were merely conduits between he and Sweeney. Sweeney's purchasing decisions were made independently of the Ballantynes. The evidence supports the conclusion of the District Court:

> The fact that the maps were used by Frosaker while buying leases for three different employers[2] over an

[2] We agree with the Hunts that Mobil Oil had no influence on the development of the Frosaker maps at issue. The maps reflected the directives of the Ballantynes and Sweeney.

extended period of time, and revised as his leasing operations progressed, destroyed their probative value in the effort to determine the buylines, if any, that were furnished him by the Pan American operation.

Frosaker did not know the source of the information upon which the Ballantynes relied in directing his purchases.

The Hunts, however, ask us to review the evidence with more specificity, distinguishing between those areas where Frosaker purchased for both the Ballantynes and Sweeney and those areas where he purchased only for the former. Also, they ask us to reject the conclusion that Sweeney influenced the development of the Frosaker maps. They base this request on the similarity between the buy lines coupled with the fact that Todd, or Reishus, had the opportunity to acquire and pass to the Ballantynes the Hunt buy maps.

a. Windmill.

Frosaker purchased coal leases in the Windmill area of Dunn County for the Ballantynes and Sweeney. The final perimeter for this buy area was established by the Hunts in January, 1973. The Ballantynes first leased in this area in April, 1973. The Hunts' contention that the Ballantynes used their confidential information rests solely on the fact that the northern half of Frosaker's map includes, within its buy area, the pre-January, 1973, Hunt buy area. The southern half of the Frosaker map is not similar to the Hunt buy area.

The Hunts ignore the fact that the Ballantyne leases within the northern half of the Frosaker buy area are also near coal leases of the Wilhite Company. Frosaker's directions, reflected on his map, are consistent with the purchasing methods of the Ballantynes. These leases are also consistant with the buy area maps introduced by the Ballantynes. Moreover, additional facts are inconsistent with the Hunts' contention. If the Ballantynes had the Hunt map, it is less

likely that they would have purchased the leases that are outside of the Hunt buy area and unlikely that they would have let options to purchase additional leases that were within the Hunt buy area lapse. We cannot say that the District Court was clearly erroneous.

b. Hanks-Grenora.

The Hunts established their buy area for Hanks-Grenora in the summer of 1972. The Ballantynes first purchased leases in this area in January, 1973. In total, nine leases were purchased. The Ballantyne leases were within their buy area and the buy area shown by the Frosaker maps. They were outside of the Hunt buy area.

The Hunts contend, nevertheless, that the Ballantynes had their information because the Frosaker buy line is similar to the buy line on the Hunt map. The similarity prevails if the Frosaker buy line is moved three sections to the west. The District Court found this three-section error to be fatal to the Hunts' contention. We agree.

Within the Hunt buy area is the town of Hanks, a likely and easily identifiable landmark for anyone who would have traced the Hunt buy area map. It is not reasonable to assume, then, that the Frosaker map is in fact the Hunt map erroneously copied. The record before us does not support the Hunts' statement that the error could have occurred because its buy maps did not show towns. The contrary is true.

The Hunts point to a further similarity to support their claim. The Frosaker and Hunt buy lines break and then continue at approximately the same place in the southwestern portion of the buy area. Of course, the Frosaker map shows the break to be three sections to the east and it is approximately one-half section to the north. But the similarity is significant because the break in the Hunt buy line reflects adverse topographical features of the land. The

topography, the Hunts claim, could only have been known by the Ballantynes through wrongful possession of their information.[3]

Frosaker, pursuant to instruction, excluded from his areas of purchase buttes and river beds or other obvious topographical features that would render a lease valueless. Such adverse topography could be observed visually by one working the area and noted on a map. The Ballantynes assert that this explains the break in Frosaker's buy line.

The Ballantynes' explanation is, on its face, reasonable. Perhaps under North Dakota law this is sufficient to conclude that the clear and convincing standard of proof has not been met. *See Scheid v. Scheid, supra* at 840. We are, however, uneasy with that conclusion because the testimony of Frosaker's practice of noting topographical features was general and not specifically related to his Hanks-Grenora buy line. On the other hand, the Hunts did not offer any evidence to show that the break in Frosaker's buy line could not have been the result of the topography of the area of the break. Because of the three-section error and because we cannot accept the corollary to the Hunts' contention that the Ballantyne buy area maps are fraudulent, *see infra*, we must conclude that the District Court was not clearly erroneous in finding that the Ballantynes did not have confidential Hunt information for the Hanks-Grenora area.[4]

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[3] The Ballantynes did introduce a topographical map of the area. But the Ballantynes did not reflect the topography in their buy area maps, and there is no evidence that Frosaker relied on the topographical map.

[4] The District Court further relied upon the fact that Frosaker's map could have reflected the purchasing decisions of Sweeney as well as the Ballantynes. Sweeney did purchase in Williams County and Frosaker was his principal landman. Moreover, because Frosaker was not aware of the source of the Ballantyne directives, he could have been mistaken in his belief that he purchased solely for the Ballantynes in Williams County. Accordingly, it could not be said with equal force that the Frosaker map reflected Hunt confidential information filtered through the Ballantynes. This is a reasonable theory under the evidence. But we find it significant that Frosaker's maps for Williams County were not, in contrast to his Dunn County maps, objected to under this theory.

c. New Salem-Glen Ullin.

The New Salem-Glen Ullin buy area for Morton County was established by the Hunts in early in 1972. The Ballantynes first purchased coal leases in the area in early 1973. New Salem-Glen Ullin was an area of heavy Hunt activity which made it relatively easy, by checking the courthouse records of the recorded leases, to define the Hunt buy area.

Frosaker worked only for the Ballantynes in Morton County. While his maps do not show a complete buy area, they do outline portions of a buy area that is similar to an early Hunt buy area. The Hunts contracted their buy area, after purchasing leases in the omitted portion, in February or March, 1973. The Ballantyne purchases that are within the Frosaker buy area later omitted by the Hunts were made after the Hunts had leased in the area. No adverse inferences arise from the fact that the Ballantynes followed the Hunts' leasing activity.

The Hunts also rely on the following notations made in reference to particular leases on the Ballantynes' business records, "didn't pay-out of area;" and "Frosaker said Todd approved this lease OUT of Area." The notations referred to leases secured by Frosaker in June, 1973. Todd was not then a Hunt employee. They are considered important because the leases were not outside of the Ballantyne buy area; they were outside of the Hunt buy area. The inference arises, the Hunts contend, that the Ballantynes were leasing from Hunt buy maps.

Frosaker, as but one of the Ballantyne landmen, was not assigned an entire buy area in which to secure leases. This is consistent with the fragmentary nature of his buy line for Morton County and with the fact that the Ballantyne buy maps showed a larger target area than the Frosaker maps. It is also consistent with the explanation offered for the notations. They referred to a failure to pay Frosaker his commission for leases secured in another landman's area. A similar notation, "Out of Area," was made on the same

business record for a lease secured by Frosaker that was within the Ballantyne buy area, as well as the Hunt buy area. Moreover, it is not reasonable to assume that Todd would have approved the purchase of leases that are outside of the Hunt buy area if the Ballantynes had the Hunt maps.

Hunts' contention that the Frosaker maps evince the use by the Ballantynes of Hunt buy maps puts them in the position of arguing the corollary: the Ballantyne buy maps put into evidence are frauds. The District Court could not accept that proposition.

The Hunts filed their complaint on October 17, 1973. On October, 1973, an order issued requiring the Ballantynes to deposit with the court by October 23, 1973, *inter alia*, all of their maps pertaining to coal properties located in the State of North Dakota. Service was by mail. Among the mass of documents deposited with the court were the Ballantyne buy maps; maps which noted, in addition to the outlined buy area, the leasing activities of other companies. We, like the District Court, do not believe the Ballantynes could have fabricated these maps in the time allowed.

Moreover, we are not convinced that acceptance of the authenticity of both the Ballantyne buy maps and the Frosaker maps is inconsistent under the evidence. The Hunts urge us to conclude to the contrary because, in their view, the Frosaker buy lines are, like the Hunt buy lines, geological in nature. No reference is made to the record to support their opinion. We are left to make a visual comparison for similarity.

The perimeter, or buy line, of the Ballantyne buy areas follows the section lines. The buy lines on the Hunt maps, in contrast, twist and turn sharply in accordance with the geophysical data compiled for each area. The Frosaker buy lines are dissimilar from both. They do not present the simple outline of the Ballantyne maps nor the sophisticated outline of the Hunt maps. Frosaker's buy lines, instead, reflect the method of their preparation. They are a composite of many separate maps prepared over a number of

months by a man assigned to purchase leases in specific areas after excluding therefrom obvious areas of adverse topography. The findings of the District Court are not clearly erroneous.

2. Abshire Maps.

The evidence relating to the Abshire maps affects the Ballantyne leases in the Windmill and Deep Creek areas of Dunn County and the Roseglen area of McLean County. The maps were prepared by Bruce Abshire, a consulting geologist for Mobile Oil in August, 1973. They record the locations and identification numbers of the logs given to Mobil Oil by the Ballantynes. In addition, they note a cursory interpretation of the logs. The Hunts contend that the data recorded on the Abshire maps is so similar to the data contained on their logs that Abshire must have been plotting Hunt logs. Proof of the contention supports the additional inference that the Ballantynes possessed these Hunt logs for the purpose of intelligently purchasing coal leases. Abshire plotted over one hundred logs.

The Ballantynes admit that the information recorded on the Abshire maps, the locations and identification numbers, is Hunt information. They further admit that the information was retained by Todd from his employment with the Hunts. They do not admit that Abshire had Hunt logs. Instead, they contend that Abshire plotted logs that were manufactured by Todd and his sister in the summer of 1973. These manufactured logs, which were introduced into evidence, have been referred to as the bogus logs. They were made as a sales technique to allow Melvin Ballantyne to present a "thick file" to prospective purchasers and thereby interest them into negotiation. To make the bogus logs appear as authentic as possible, they were given a Hunt location and identification number. Thus, if the logs were checked in the field, there would be evidence of a drill hole. The locations and identification numbers came, the Ballantynes contend, from what has been termed Todd's

memory sheets. These memory sheets were prepared by Todd during his employment with the Hunts. On them, he recorded where he was to log each day and where other crews were drilling and logging. They were made, Todd testified, to aid him in the performance of his duties for the Hunts. In addition, some of the bogus logs were given locations derived from visual observations in the field.

The memory sheets were not introduced into evidence. Todd testified that he could not find them among his records. However, their existence in fact is consistent with other evidence introduced at trial. Todd worked for the Hunts in Dunn County on November 15, 17, 19-21, 1972. All of the locations noted on Abshire's map for that county were drilled prior to those dates. Thus, Todd had access, from the area map given each logger, to the locations and identification numbers noted by Abshire. In McLean County, Todd was asked to core the locations noted by Abshire. Although this coring was eventually done by Reishus, Todd stated that he kept the list of locations where the work was to be done.

Resolution of the Abshire map controversy turns upon the source of the information recorded by Abshire. We examine the evidence as it relates to each county separately.

a. Dunn County.

The Abshire map plotted one hundred and twelve locations. Of those, one hundred and two locations correspond to Hunt drill holes. This information could have been taken from the face of the Hunt logs or from the face of the bogus logs. Todd's memory sheets recorded the locations of the drill holes for the Windmill and Deep Creek buy areas of Dunn County. Thus, while the correlation of the Abshire locations and the Hunt locations is high, it does not support the contention that Abshire had Hunt logs. The Ballantynes argue that the ten Abshire locations that do not correspond to Hunt drill holes supports their contention. These locations, they assert, relate to drill holes observed visually and attributed to the bogus logs. Absent a plotting error by Abshire, the inference is that he did not have Hunt logs.

The identification numbers noted by Abshire correspond exactly to the numerical portion of the identification numbers placed on the Hunt logs in the field by each logger. The alphabetical prefix used by the Hunts was not noted on the Abshire map. Abshire refused to speculate, as suggested by the questioning of Hunt counsel, that he omitted prefix letters for convenience, it being repetitious to put the same letter before each number. Nevertheless, the Hunts contend that this is conclusive proof of their contention that Abshire was given Hunt logs by the Ballantynes.[5]

The Hunt identification numbers were noted on the face of their logs. These numbers were, in some instances, changed at the Dallas offices because of duplications in the field. Thus, if Abshire plotted copies of Hunt logs, those copies must have been made before the originals were sent from North Dakota to the home office. As stated, *supra*, the opportunity to acquire copies of the Hunts' logs was limited. Moreover, only twenty-seven of the logs noted by Abshire were taken by Todd.[6] This limited opportunity does not, of course, foreclose the possibility of wrongdoing. But it does render more likely the Ballantynes' explanation that Abshire had bogus logs that were assigned Hunt identification numbers from Todd's memory sheets.

[5] The identification numbers placed on the Hunt logs in the field were sequential, except for a gap between numbers forty-five and fifty-one. The Abshire map also showed no logs numbered forty-six through fifty. This correlation could be because Abshire was plotting Hunt logs or because he was given this information from Todd's memory sheets. It is proof that the Ballantynes did not simply assign the bogus logs identification numbers of their own creation.

[6] As stated previously, the evidence does not implicate Mark Reishus in the alleged wrongdoing of the Ballantynes. A contrary conclusion is inconsistent with the numerous Ballantyne leases taken outside of the areas of commercial coal and with the fact that in many cases there was a substantial time lag between the Hunts' entry into an area and the first leases taken by the Ballantynes.

But, the bogus logs showed only locations; they did not have on their face identification numbers. Thus, Abshire could have recorded this information only from the Hunt logs or the supplemental sheets which Abshire stated were included with the bogus logs. He identified the supplemental sheets as few in number and handwritten but could not recall what information they contained. The supplemental sheets were not introduced into evidence. Of critical importance then is the procedures employed by Abshire in making his maps and the contents of Todd's memory sheets from which Abshire's supplemental sheets were made.

Abshire's testimony was guarded. At one point, he stated that he found the information recorded on his maps on the face of the logs and in the supplemental sheets. But, at other points, he was more specific, stating that he took the identification numbers from the face of the logs. The supplemental sheets were used only as a cross-reference to the information contained on the logs. Since the supplemental sheets were a cross-reference, we logically assume, although the argument was not made by the parties, that they contained identification numbers as well as locations. Nevertheless, Abshire's testimony must be read as stating that at least as to some logs, the identification numbers were taken from the face of the logs.[7]

Moreover, while Todd had access to both the locations and identification numbers of the Hunt drill holes plotted on the Abshire map, he stated clearly that his memory sheets contained only location data. Only Melvin Ballantyne stated that the memory sheets contained identification numbers. But his testimony was equivocal. Indeed, at one point in the record, he stated that he had never seen Todd's memory sheets.

[7] Abshire's testimony was not foreceful. At one point, he stated: Nor do I necessarily know that that's — I assume that that was on the log because I have it here as part of a code number for that log. That's the only assumption that I can draw at this time.

Were this the only evidence on the issue, we would conclude that the District Court was clearly erroneous. Abshire recorded the identification numbers that were taken, at least in part, from the face of the logs. That information was not retained by Todd on his memory sheets and was not on the face of the bogus logs. Abshire must have been recording that information from Hunt logs.[8]

But this is not the only evidence on the issue.

In addition to the ten locations plotted by Abshire that did not correspond to the location of Hunt drill holes, there were twenty locations plotted by Abshire at which the Hunts drilled a hole but did not log. For these locations, the Hunts placed a blank log in their file. But Abshire could not recall plotting blank logs which, if he had Hunt logs, would have constituted approximately eighteen percent of all the logs plotted. The reasonable inference from this evidence is that Abshire did not have Hunt logs.

Also, Abshire considered the logs before him to be of poor technical quality. The bogus logs indisputably fall within that characterization. The Hunt logs, by contrast, were of high quality.

[8] The District Court's analysis of the source of the identification numbers recorded by Abshire, referred to below as well numbers, is self-defeating. It said:

> There is evidence before the Court that certain "supplemental material," in the form of Todd's memory pads, was also given to Mobil which did carry shotpoint *locations*, by section, range and township of the drill holes. While Abshire recalled that "the logs contained in addition to the graph portion, well number and location" (indicating figures on the logs themselves, he also responded in the following manner:
>
> "Was there any other information that you used in constructing the work you did on this map other than logs?"
>
> • • • •
>
> "As I recall, there were a few sheets. I can't give you an exact number of supplemental *location* data." (Emphasis supplied.)

By the District Court's analysis, the identification numbers could not have been taken from the supplemental sheets.

The Hunts attempt to minimize the force of this evidence by arguing that Abshire's characterization of the logs before him was premised on a false assumption. Abshire believed that he had density logs; the Hunts made gammaray logs; accordingly, Abshire could have had Hunt logs and still believed them to be of poor quality because he did not realize the type of log he had. We reject this argument. Abshire's characterization related to the technique or skill displayed in the recording of the information shown on the logs. It did not relate to the type of information recorded. This was corroborated by the testimony of Zimmerman, a Hunt geologist. He stated that the bogus logs evinced the poor operation of the logging machine and that a logger who consistently produced such logs would be fired. Again, we must infer from this evidence that Abshire did not have Hunt logs.

Abshire also noted on his maps those locations at which the log indicated at least a ten-foot intercept of coal. Operating under his original assumptions as to the type of log before him, he was asked to interpret two corresponding Hunt logs. He failed to make the same interpretation as to one of those logs. While the number of comparisons was small, it is reasonable to assume that Abshire would have made the same interpretation in both cases if the logs he plotted originally were Hunt logs. Because the sample was so small, however, we can accord this evidence little weight.[9]

[9] The Hunts contend that the fact that Abshire interpreted the logs before him is evidence that he had Hunt logs. The contention is premised on the opinion that the bogus logs were not interpretable because they did not designate the scale by which to measure the recorded information. It is clear that the bogus logs could not be interpreted with certainty. But Abshire's purpose in plotting the logs did not require definiteness.

Todd testified that he made the bogus logs to appear as authentic as possible. To that end, he proceeded under the assumption that each hash mark on the graph paper represented two feet. This is the same scale that is used on the Hunt logs. Accordingly, Abshire could interpret the bogus logs if he assumed the scale.

Finally, it is significant that the Ballantynes let options to purchase leases in areas near the locations noted on Abshire's map lapse. Under the Hunts' contention that over one hundred of their logs were possessed by the Ballantynes, we must assume that the latter acquired them for the purpose of intelligently purchasing coal leases. But if the information extracted from those logs showed no commercial coal, it is unreasonable for the Ballantynes to have purchased the options to lease. Contrarywise, if the logs showed commercial coal, or if a positive decision could be extrapolated from them, it is unreasonable for the Ballantynes to have let the options lapse. The Ballantynes did not act consistently with the contention that they possessed Hunt logs. Moreover, while the Hunts first purchased in the Windmill area in February, 1973, the Ballantynes did not secure their first lease in that area until April, 1973. Most of their leases were purchased in July and August of that year. In the Deep Creek area, the Hunts first purchased in July, 1972; the Ballantynes first purchased in February, 1973. The possession by the Ballantynes of geophysical data is inconsistent with their delay in securing leases. The delay in securing leases is consistent with the Ballantynes' stated method of purchasing.

The evidence is conflicting. It both supports and refutes the contention that the Ballantynes possessed Hunt logs. Were we the triers of fact, perhaps we would have struck the balance differently and found for the Hunts. But, they carried a heavy evidentiary burden below and our review is limited by the clearly erroneous standard. We are not firmly convinced that the factual findings of the District Court are erroneous.

b. McLean County.

Abshire plotted eight logs in the heart of the Hunt Roseglen buy area in McLean County. The locations and identification numbers recorded by Abshire correspond exactly with Hunt logs; logs which were probably returned to North Dakota from Dallas for coring purposes.

Again, Todd's testimony explains the possession of the location information. He did not, however, admit to retaining the identification numbers. From this evidence alone, we would find for the Hunts.

But the Ballantynes' purchasing decisions are not consistent with the possession of Hunt logs. None of their leases were in the heart of the Roseglen area. Indeed, most were outside of the buy area completely. Moreover, the Ballantynes' first leases were taken more than a year after the Hunts initiated their leasing program in the area. The Ballantynes followed the lead of the Hunts; they did not act independently as would be expected if they possessed geophysical data. Again, we cannot say that the District Court was clearly erroneous.

The order and judgment of the District Court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
FOR THE EIGHTH CIRCUIT

August 24, 1976

Mr. Patrick W. Durick
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Thames & Pearce
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Bismarck, ND 58501

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Mr. Burns H. Errebo
Mobil Oil Corporation
P.O. Box 5444
Denver, CO 80217

Re: 76-1015. William Herbert Hunt, et al vs. Pan American Energy, Inc., etc., et al.

Dear Sirs:

Enclosed herewith to each of you please find copy of an order entered at the direction of the Court.

Very truly yours,

Robert C. Tucker
Clerk

kdk
Enclosure (1)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1015.

September Term, 1975

WILLIAM HERBERT HUNT, et al,

Appellants,

vs.

PAN AMERICAN ENERGY, INC., etc., et al,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

August 24, 1976

FILED
DEC 21 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-717

NELSON BUNKER HUNT AND WILLIAM HERBERT HUNT,
Petitioners,

v.

PAN AMERICAN ENERGY, INC., a North Dakota corporation, MOBIL OIL CORPORATION, a New York corporation, and MELVIN ("PAT") BALLANTYNE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF BY RESPONDENT MOBIL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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December 21, 1976

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BRIEF BY RESPONDENT MOBIL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

The questions presented by Hunts are concerned with whether the courts below were doing an acceptable job technically. Specifically, the attack of the Hunts is based on the allegation that the 8th Circuit Court needs supervision because:

> . . . the courts below apparently felt no need to carefully formulate the issues. They did not, in fact, ever define or address the true issues in this cause. (Petition for Writ, 10)

The two "questions presented" which Hunts put forward are not meaningful issues in this case; but if they must be discussed, the language and context should be altered. We will discuss, in detail, later in this brief the fact that Hunts' chosen issues are not meaningful. Suffice it to say here that the language the Hunts have chosen arises from the following:

1. The first purported "question presented" arises from (a) Hunts ignoring portions of the opinion below and (b) the Hunts' failure to brief issues or to ask the appellate court to consider relief in the form of damages; and

2. The second supposed "question presented" develops from the Hunts (a) misreading the opinions below, and (b) ignoring those portions of the opinion which make it clear that the several judges, after sifting through the thousands of documents and hundreds of pages of testimony, felt that decision was unaffected by the relatively minor point the Hunts are concerned about.

We think that the questions presented—if indeed there is any merit at all in Hunts' case—should be phrased to ask:

1. Whether the appellate court's opinion responded to the issues briefed and the request for relief addressed to it by Hunts, and

2. Whether, after the appellate court was asked by Hunts to find the facts anew, it erred in failing to remand after its finding that the trial court erred on one minor point, when the appellate court judges considered the decision independently sustained by evidence on more relevant issues.

REASONS FOR NOT GRANTING THE WRIT— SUMMARY OF ARGUMENT

This is a case which turns on the trier of facts' assessment of thousands of exhibits and two weeks of testimony. The courts below found facts which dispose of the case on independent grounds, but plaintiffs Hunts are ignoring those facts. The issues to be decided, and the items to be discussed, depend upon an appreciation of the evidence.

Furthermore, issues not presented to the courts below cannot be raised now. The Circuit Court disposed of, and responded to, the issues presented to it. The complaint against Mobil (and even the amended complaint presented by the plaintiff after trial to conform the pleadings to the evidence) does not allege any tort committed by Mobil and only seeks a constructive trust against the leases held by Mobil. In the courts below, the plaintiffs never attempted to argue that the courts of North Dakota might adopt a different standard of proof if some remedy other than a constructive trust was sought. The indications are that the North Dakota court would hold that the standard of proof would be the same in any case of obtaining property unfairly. However, we do not at the United States Supreme Court level reach the issue of what the North Dakota court might do, because that issue was not presented to the Circuit Court below.

Moreover, the issues suggested in the Petition for Writ of Certiorari are false issues; and they simply do not exist in the case. As is discussed in detail in this brief, the issues suggested by the Hunts arise from their unwillingness to understand certain pieces of evidence or to appreciate and accept the factual finding of the courts below: that there simply was no causal connection between anything the Hunts owned and the leases which

Pan American obtained. Factual determinations dispose of this case.

In any event, the claimed issue of what North Dakota law might be, and the claimed issue that in this instant case the courts below did not understand the evidence they were reviewing, are not issues of national gravity or significance.

1. The courts below assessed the mass of evidence and found facts which dispose of the case but which Hunts ignore.

If the reader feels that this brief seems to describe a different case than that which Hunts presented in their statement, it is perhaps because this is a lawsuit involving thousands of exhibits and hundreds of pages—two solid weeks—of testimony. Reducing this testimony into a short summary creates distortions; however, we will try to be brief but accurate. If the reader desires a longer summary, we would suggest that the trial court and appellate court decisions compressed the facts into manageable outlines, and their opinions may be referred to for a fuller—although still much abbreviated—description of the case.

This case involves a period of intensive coal land leasing in the state of North Dakota. In the words of one witness: "The country was loaded with people, couldn't get rooms in motels, rigs all over the area, coal detection rigs." (Transcript V, 106)[1]

There was a plethora of geological information publicly available concerning coal deposits in the state of North Dakota. As a result, many companies worked in the same areas. The plaintiff Hunts and the defendant Pan American Energy, Inc. (Pan Am), were but two

[1] References to the transcript are to volume by Roman numeral, followed by the page in arabic numerals.

of these companies engaged in leasing in many of the same area. (*See, e.g.*, exhibits reproduced at Transcript IX, 23-38.)

Hunts heard what their own brief characterizes as rumors that Pan Am leased because of Hunts' geological information; and motivated by these rumors, Hunts sued Pan Am.

Mobil Oil Corporation had never had business dealings with Pan Am prior to or during the times when Pan Am purchased the coal leases in dispute. Mobil was named as a defendant essentially because it had purchased the coal leases from Pan Am; and plaintiffs wished to impress a constructive trust upon those leases, and obtain title to them.

Hunts presented the case to the trial court on the theory that a major copying of Hunt drilling logs had taken place. Much testimony was devoted to these logs. It appeared that thousands of drilling logs produced in North Dakota were sent to the home office of Hunts in Texas almost immediately after they were produced, with no copies retained in North Dakota. The original logs were then kept at Hunts' home office in Texas. (Transcript, V, 231; V, 232; IV, 224) Only in rare and limited circumstances would an occasional copy of a drilling log return to North Dakota. (Transcript IV, 224) Therefore, unless you worked at the Hunts' home office (or just happened to be a field team laborer at the time and place a particular log was produced by a drilling rig), there was no opportunity to see or copy any logs.

The plaintiffs' theory at the trial court level was that a geologist named Mark Reishus from Hunts' home office had been the primary source from which Pan Am (and its principal officer, Ballantyne) had obtained confidential Hunt information. The following quotation sums up

the trial court's finding on this matter. (Note that the trial court findings are on a preponderance of the evidence—not on the clear and convincing standard which Hunts argue, in their Petition for Writ of Certiorari, to have been all that was used by the courts below.) The trial court stated:

> Plaintiffs have presented their case on the theory that Mark Reishus was the primary source from which Ballantyne obtained confidential Hunt information. *The fair preponderance of the evidence before this court is not sufficient to support such a theory.* (Emphasis supplied.) (Appendix 42)

The trial court made a specific finding that:

> Reishus' testimony and demeanor at trial was forthright and credible . . . (Appendix 42)

That finding as to credibility of Reishus, as a witness presenting oral testimony, is important because that testimony was:

> Q. Mr. Reishus, have you ever given confidential Hunt information to Pat Ballantyne or anyone associated with Pan American?
>
> A. I have never given confidential information to anyone. (Transcript V, 293)

The 8th Circuit judges, after reviewing the evidence, likewise made a finding having little to do with a "clear and convincing standard" that plaintiffs have complained about. The finding of the appellate court was:

> Moreover, we are of the opinion that the evidence presented to implicate Reishus in the allegedly unlawful scheme of the Ballantynes has *little, if any, probative force* when the record is considered in its entirety. (Emphasis supplied.) (Appendix 87)

In Hunts' present statement of the case, the name Reishus (the principal accused at the trial) is found only once—in an incidential reference to the fact that he and another man were geologists for the Hunts. Having been soundly defeated at the trial court level on

their theory regarding the person who had access to the drilling logs at Hunts' home office, plaintiffs at this late stage turn their attention to one Todd Ballantyne as the alleged primary source.

Todd Ballantyne, a college student and son of one of the Pan Am principals, had worked for Hunts as a laborer in the field—not in the office—during a vacation from college. The statement by the Hunts in their petition (at page 4) that "Todd had access to all of their geological information," is not correct. Although thousands of logs were produced in North Dakota, they were mostly produced *before* Todd worked for Hunts; they were sent to Texas almost immediately after being produced; and no copies were retained in North Dakota. During the limited time Todd worked as a laborer with the drilling rigs, *no* logs were produced for most of the areas in question. Todd worked only in parts of four counties. For those few months, Hunts' entire organization in North Dakota produced only sixty-four logs (Exhibit #6031; Transcript IX, 21); of those sixty-four logs, only nineteen showed coal in commercial quantities; and furthermore, Todd's team was not even involved in all of the drilling and logging work on those nineteen logs. Small wonder that, at the trial court level, Hunts argued it "must" have been their home office employee Reishus who gave out secret information kept at the Texas home office. It would have been ridiculous, at the trial court level, to try to prove that hundreds of leases across a dozen counties had been obtained because a Hunt laborer (Todd) knew about a handful of logs in four counties. Yet, that is what we now hear argued by Hunts to this Supreme Court, in their petition arguing that the courts below did not address the true issues!

Todd worked in the field as a logger—not in the office, and not in the buying department. Hunts' "buy area" maps were kept in their office at Williston, North

Dakota. Most of the time, Todd was headquartered working out in the field, in country areas *a hundred miles away*! Furthermore, the Williston office was tended by other people of the Hunt organization at all times. No Hunt employee testified that Todd Ballantyne kept "dropping in," or was rummaging around in the Williston office looking at things he would not normally see in his job.

Plaintiffs' chief home office executive officer in direct and complete charge of geologists (the department Todd worked for in the field); and of the landmen (the department which had buy area maps and did the leasing); and also of the entire coal leasing program and the Williston office in North Dakota, was James Jordan. Jordan, this Hunt executive, testified that Todd and other Pan Am people did not have the buy area maps which Hunts urge are involved:

> Q. In response to Mr. Thames' question you said *you do not think that the [secret geological Hunt] buy area outline was obtained by Pan American.* Why do you think that outline was not obtained?
>
> A. It was or would be and had been the practice in the past by oil companies to establish what somebody's buying outline might be by going to the courthouse. (Emphasis supplied.) (Transcript V, 143-144)

If Hunts' chief responsible executive agrees with defendants that Pan Am did not obtain buy area maps of Hunts, we think the courts below were addressing the correct issues in deciding that the exact amount of Todd's access made little difference in the disposition of the case, and in focusing on whether Hunt materials were actually used by Pan Am in its leasing.

We should also note that the statement in Hunts' petition that Todd "admitted making and taking copies

of the Hunts' logs without permission" is true as far as it goes, but it is definitely misleading. The evidence merely showed that Todd, a college student, took a few copies of logs when returning to school—copies he had made as souvenirs to show his friends. He had been told that these copies he took were of no commercial value, and the Hunt geologist testifying at the trial for Hunt agreed that they were of no commercial value. (Transcript III, 160-162; III, 190-191; IV, 219-220)

As to Todd Ballantyne, the appellate court reviewing the documents stated (and again, note that this is *not* a matter of "not found clear and convincing," but rather an affirmative finding of the preponderance of the evidence favoring the defense):

> Moreover, *the evidence was that Todd did not show his father the Hunt information* [the logs or drilling location information] he retained until after the Ballantyne leases were purchased. . . . (Emphasis supplied.) (Appendix 84)

The complaint presented to this Supreme Court is that the courts below utilized only a "clear and convincing" standard in assessing evidence. As noted above, the courts stated findings phrased not only in terms of the failure of the plaintiffs' proof, but also phrased affirmatively as to what the defense evidence proved.

Turning now to the issue of proximate cause and whether Pan Am's leases sought by Hunts were based on Hunt information (assuming for purposes of argument that Pan Am had some Hunt infomation in an unexplained manner): this was clearly considered by the trial court:

> The court: "Well, it seems to me that the *ultimate issue in this case is where the defendants*, particularly defendant Pan American and Ballantyne, *acquired the information which was used as a basis*

> *for procuring the leases* . . . and on that basis the court is going to overrule the objection." (Emphasis supplied.) (Transcript III, 40)

On the issue of what was used by Pan Am to obtain leases, the specific, positive finding of the trial court was that:

> The Pan American leasing program was a flexible non-structured operation adapted in each area to the information Ballantynes were able to accumulate. It admittedly involved a great amount of guesswork. *But the pattern of leasing was based on reading public information, observing drilling activity in these areas, examining courthouse information, noting old or existing coal mines, visiting with the landowners and buying in between the majors.* (Emphasis supplied.) (Appendix 54)

The Hunts, in their Petition for Writ of Certiorari, create false issues by their strange clinging to their own unique interpretation of facts. For example, at page 11 of the petition, it is stated:

> The courts below rely heavily in their opinions on the fact that persons could have observed the Hunt drillers and loggers as they worked in the field. If this fact is of any significance whatsoever, it is for its implication that *the information which resulted* from the Hunt exploration in North Dakota was not secret . . . . Therefore, the courts, without considering the point, inadvertently held that North Dakota does not adhere to the doctrine of relative secrecy. (Emphasis supplied.)

Hunts then go on to discuss the doctrine of relative secrecy of the paperwork "information which results" from drilling, as though that were something at issue. The point is: the Hunts are wrong in saying that the courts below could only have thought observation of Hunt drillers was important because the "information

which resulted" (logs and maps) was not secret. Instead, the courts were pointing out that the physical presence of large coal drilling rigs (not considered secret even by Hunts) in an area was one of several public, legitimate sources of information.

For an example of how the trial court was *not* using the doctrine of relative secrecy in regard to Hunt buy area maps or logging information, see the trial court's opinion at page 24 of the Opinion, Appendix page 52. The trial court and appellate court were not "inadvertently" discussing the relative secrecy of Hunts' papers (maps and logs); but rather, they were talking about the legitimate compiling of information, in the same way that even Hunts compiled information indicating where to lease. (Hunts themselves followed other companies' drilling rigs watching where they drilled.) The courts below were faced with an argument by Hunts that the "only way" Ballantynes would have bought where they did was through secret papers (logs and maps.) Obviously, there were perfectly legitimate ways for anyone to find out where to buy leases: one of which was watching the many companies' drilling rigs in the countryside—without having Hunts' logs and maps.

The plaintiffs, at their petition, page 13, allege that they "proved that they had been damaged by defendants' commission of the tort of misappropriation of trade secrets." No such thing has been proved! On the contrary, as noted, the trial court found no proximate cause between any Hunt information and the leases Ballantyne purchased.

Most of the Ballantyne leases were purchased in areas outside the Hunt buy area—in the very areas where Hunts' secret information showed there was no coal. One can hardly see how the plaintiffs were damaged if the specific finding is that Ballantyne purchased where

Hunts' secret information showed it was useless to purchase; and indeed, the defense evidence was found to show affirmatively that Ballantyne's purchases had been based on legitimate information, not Hunts' secret information.

The trial court's affirmative finding, on a preponderance of the evidence for the defense, that the Pan Am leases were based on legitimate information, has not been declared to be clearly erroneous by the Circuit Court. On the contrary, the Circuit Court in analyzing individual areas supported the trial court with statements like that which follows concerning the Sawyer-Velva area, the area of most of Pan Am's leases:

> The Hunts . . . point to *no positive evidence* in the record, either of a direct or certain substantial nature, *that supports the proposition that the Ballantynes used Hunt data in this area.* (Emphasis supplied.) (Appendix 90-91)

In short, the Hunts are disappointed plaintiffs on findings of fact. They choose to ignore those portions of the opinions below which find (1) that the accused did not take information; and, (2) as an independent and separate ground for dismissal of the complaint, that the Pan Am leases were acquired because of legitimate public information—there being no causal relationship between Hunt data and Pan Am leases.

2. The Appeals Court disposed of, and responded to, the issues presented to it (and issues not presented to it cannot be raised now.)

Plaintiffs' argument that they should be allowed a new trial to see if they can get damages is clearly not appropriately used against Mobil. In their complaint against Mobil, no wrongful act of misappropriation—no tort—was alleged. The only allegation against Mobil was that "if Mobil Oil Corporation has acquired

such leases, then in that event they hold them in trust for the use and benefit of plaintiffs." And the only prayer for relief against Mobil was a prayer for a constructive trust.

Even in their amended complaint, after the trial, to conform the pleadings to the evidence, dated March 21, 1975, the plaintiffs did not allege any tort by Mobil. They did not ask for damages against Mobil, but only that a constructive trust be imposed upon Mobil. Furthermore, the court denied, by its order of August 18, 1975, any attempts to change the original prayer for relief; and this has never been claimed as error in briefs to the Circuit Court.

It is therefore clear that Hunts' whole present argument, that the courts below should be supervised to consider damages issues, is inappropriate and untimely as against Mobil. Clearly at this late date, in the Superior Court, plaintiffs cannot be allowed to amend their complaint against Mobil to insert a claim for damages and to assert some tort committed by Mobil.

The obvious reason why the opinions below discuss "clear and convincing" and point out that the plaintiffs have failed in that regard, is because the plaintiffs' briefs to the courts below kept insisting that was the standard Hunts had met for relief against *all* defendants. Hunts argued to the appellate court that they had established matters against all defendants by "clear and convincing proof," and that the trial court was erroneous in its contrary affirmative findings.

It was in that context that the appellate court responded. At one point the 8th Circuit Court responded to Hunts not only by saying that Hunts had failed completely on one issue, but also by adding a pointed comment about Hunts' argument that their case was proven by clear and convincing evidence:

> *The Hunts . . . point to no positive evidence* in the record, either of a direct or certain substantial nature, that supports the proposition that the Ballantynes used Hunt data in this area. Instead, they argue. . . . *We*, like the district court, *do not consider argument to be clear and convincing proof.* (Emphasis supplied.) (Appendix 90-91)

As we have noted before in this brief, the trial court made affirmative findings that Pan Am's leases were *not* based on Hunt data, but rather on legitimately and separately acquired information.

Further, as we have noted before in this brief, the trial court made affirmative findings of fact based on what it described as a preponderance of the evidence, that the person who had access to the drilling logs kept in Texas (Reishus) did not transmit any confidential information. The further discussions by the courts below about "clear and convincing proof," and the plaintiffs' failure to meet that burden of proof, must be read in the context of Hunts' briefs to the courts below: in which Hunts asserted that they had established a right to a constructive trust against all defendants.

Moreover, North Dakota statutes provide that there is no common law in any matter where the law is set forth by the code. N.D.C.C. 1-01-06. It might well be that where property is gained by fraud or other wrongful acts, the action for constructive trust and accounting is the only one authorized by North Dakota law. North Dakota statute N.D.C.C. 59-01-06 provides that one who gains a thing by wrongful act is an implied trustee; and further provisions allow for accounting of profits, replacing, or returning the property. The code does not provide for actions for damages in constructive trust situations.

What the North Dakota Supreme Court might hold if the issue of damages or burden of proof were pre-

sented to it has certainly never been mentioned earlier to the courts below. It strikes one forcibly that none of the cases now cited by Hunts as to burden of proof are found in their briefs below. Certainly there are cases indicating that the degree of proof when unlawful use of trade secrets is alleged is the same, whether damages or injunctive relief or accounting or constructive trust is alleged. Surely, it would not make sense to the layman to hear that a court has said a man could hold property as his own, but would have to pay damages for it not being his property. A number of cases around the country have taken the common sense approach and held that even when constructive trust is not sought, a stronger degree of proof than mere preponderance is required. It has been held that in unfair competition cases the right to relief must be established by "clear preponderance of the evidence"; or that the testimony should be "direct, clear and positive" or "clear and convincing." *Soft-Lite Lens Co.* v. *Ritholz*, 21 N.E.2d 835 (Ill. 1939); *Zangerle and Peterson Co.* v. *Venice Furniture Novelty Manufacturing Co.*, 133 F.2d 266 (3rd Cir. 1943); *Eli Lilly and Co.* v. *William R. Warner and Co.*, 268 F. 156 (D.C. Penn. 1920); *Mycalex of America* v. *Penco Corp.*, 159 F.2d 907 (4th Cir. 1947).

Cases involving the question of unfair use of trade secrets require a judgment on the use of business information in areas where Congress has chosen not to give patent-or copyright-style protection. Hence, the courts traditionally have sought impelling reasons to act where the legislature has thought it unwise to provide protection. The nature of the requirement of something more than mere preponderance of the evidence arises out of the nature of the cases where unfair use of trade secrets is alleged, and not from the simple fact that a constructive trust is involved. But discussions of what that burden of proof consists of (and whether it is

greater or less for the same wrong, but differs upon the relief requested for the wrong) cannot be made for the first time to this Court.

In a footnote in the Circuit Court opinion, the Circuit Court noted that Hunts could not bring before that court issues which had not been presented to the trial court. (Appendix 77) In like manner, Hunts cannot now ask the U.S. Supreme Court to superintend the job of the circuit courts, by requiring the 8th Circuit Court to consider awarding damages when no such request was argued or briefed to the Circuit Court.

In general, where a cause has been brought up for review from an intermediate court of appellate jurisdiction to a higher court, the only issues properly before the higher court are those presented to, and passed on by, the intermediate court. This proposition is so well established in American law that citation of authority for it is unnecessary. The reason for such a rules lies in numerous matters of public policy and fairness.

A party is not allowed to try his case piecemeal—presenting to some courts one theory and to another court another theory—and then attack the lower courts for not doing what was never asked of them.

Rule 28(a)(5) of the Appellate Rules requires that the appellant's brief to the Court of Appeals shall concontain: "A short conclusion stating the precise relief sought."

Hunts' "short conclusion stating the precise relief sought" in their brief to the Appellate Court was as follows:

> Plaintiffs earnestly contend that when "the qualitative factor of the truth and right of the case" is considered, this Court must be left with the "impression that a fundamentally wrong result has been reached." *The Hunts further contend that this Court may and should substitute its judgment for that of the Trial Court, correctly find the facts of this case from the evidence adduced* and remand the case to the Trial Court with instructions to enter judgment for the Hunts, *and impress upon the leases held by Mobil, and purchased from Pan Am a constructive trust in favor of the Hunts.* (Appellants' Brief to 8th Circuit, 56)

The plain fact is that the appellants Hunts never sought from the Court of Appeals damages or a consideration of a different standard of proof for damages; and they never argued that on a different standard of proof they could obtain damages. At the 8th Circuit bar, Hunts never asked the court to consider the issue of liability for damages or some lesser standard for imposition of damages; or argued that the trial court was in error in not specifically discussing damages. The argument Hunts made to the appellate court was simply that the trial court had made a wrong decision as to what the *facts* were, and that the trial court had not drawn the inferences that Hunts wanted drawn; and Hunts wanted direct contrary judgment on the facts from the Circuit Court.

In that portion of the Appellants' Brief to the 8th Circuit headed "The Court Did Not Properly Impose or Apply the Burden of Proof," pages 18-21, Hunts' only objection to the trial court finding was that the trial court seemed to have an overly cautious attitude as to the plaintiffs' proof. The word "damages" *does not even appear.*

As far the Hunts' present idea of remanding to the trial court is concerned: at the Circuit Court level Hunts contended that the appellate court should itself become a direct finder of fact, "correctly find the facts in this case from the evidence," and not remand for new trial. (Appellants' Brief to Circuit Court, 56)

The Supreme Court, on certiorari, does not discuss a petitioner's contentions which he failed to specify as errors in the Circuit Court below. *Sonzinski* v. *United States*, 300 U.S. 506 (1937).

Furthermore, another independent point should be made. All the talk in the world about whether Hunts have a choice between constructive trust and damages is seen as useless verbiage, when one considers *the affirmative finding that there was no proximate cause* between any Hunt information and the leases the Ballantynes purchased. It would be just as logical for us to complain about the fact that the trial court and the appellate court never discussed several affirmative defenses of the defendants, as it is for the Hunts to resent the trial court not discussing some of the issues that the plaintiffs might want to discuss. Such discussions simply were not required for a decision of the case.

Once the trial court made affirmative findings such as the following examples on the defense evidence of causation, it is unnecessary theorizing to talk about "what if" the trial court had *not* decided as it did; and to what level Hunts' proof would then have to rise:

> The Pan American leasing program . . . was based on reading public information, observing drilling activity in these areas, examining courthouse information, noting old or existing coal mines, visiting with the landowners and buying between the majors. (Appendix 54)
>
> The Ballantyne purchases are consistent with the general information given by the government data. They seem to be inconsistent with parts of the Hunt outlines which extend out of the area delineated by the government bulletin. . . . It would be logical to conclude Ballantynes were guided by government information. (Appendix 65)
>
> There is no evidence to show confidential Hunt data was used to obtain those leases. (Appendix 69)

The Hunts in their brief to the 8th Circuit stated that they wanted the 8th Circuit to:

> . . . substitute its judgment for that of the trial court, correctly find the facts in this case from the evidence produced and remand to the trial court with instructions to enter judgment for the Hunts . . . (Appellants' Brief, 56)

Although they said the above to the appeals court, now, in their Petition for Writ of Certiorari, the Hunts contend that the appellate court should not try a case de novo and "the Court of Appeals erred in doing so in this case." Apparently the reason for the shift in Hunts' position is that the appellate court, after examining the evidence, did not find the facts to be as Hunts imagined them.

Hunts' Petition for Writ of Certiorari says, at page 10:

> . . . . [T]he courts below apparently felt no need to carefully formulate the issues. They did not, in fact, even define or address the true issues in this case.

Mobil, on the other hand, would state that the courts knew quite well what the issues were. (Certainly after hundreds of pages of brief from the plaintiffs' side, the courts should know what the plaintiffs are driving at.) We respectfully suggest that the problem lies with the plaintiffs, who simply are unwilling to comprehend the significance of the courts' reasonings.

For example, page 12 of Hunts' petition states that, "[T]he opinions in this case to date indicate that the plaintiff in a case such as this now under consideration must prove by clear and convincing evidence that the defendant has not only appropriated the trade secret, but has *used it intelligently.*" (Emphasis is that of Hunts' petition.) The reason that the courts below pointed out that Ballantyne's purchases were not consistent with

Hunt information was assuredly not to argue that the law requires intelligent use of knowledge. Instead, the courts were rationally pointing out that the evidence indicated Pan Am (Ballantyne) had not used Hunt information. (If one has secret information showing where the coal is, one does not: buy where there is no coal but not buy where there is coal.)

In the appellate court, the Hunts argued that the trial court did not properly apply the burden of proof standard. The burden of proof which Hunts then insisted was appropriate was the burden of proof that they now attack. The Hunts said to the appellate court:

> The Hunts believe . . . that they have proven their entire case by clear and convincing evidence, as required by the court below. (Appellants' Brief to 8th Circuit, 18)

Not since was this standard attacked as the wrong standard. One looks in vain through the briefs submitted to trial and appellate courts for any presentation of the issues which are now brought before this Court as justification for exercise of the superintending powers of the United States Supreme Court.

It is well established that issues not argued are waived.

The Supreme Court of the United States was not established as a court to provide plaintiffs a new forum to argue about what North Dakota law was, when that issue was briefed neither to the trial court nor to the Circuit Court.

3. The appeals court did not find the trial court clearly erroneous on two threshold issues, but rather only found what it considered one error on a minor subitem which did not change the conclusions regarding independent issues dispositive of the case.

Hunts claim that the trial court was found to be clearly erroneous on what Hunts characterized as two threshold

issues. Hunts are mistaken. There were neither "two", nor were they "threshold" in the sense of being the only ways into the decision. We will discuss in turn the two items mentioned by Hunts.

The trial court found that Todd Ballantyne had only a minimal opportunity to acquire Hunts' buy area maps. The trial court, which has the responsibility of working in North Dakota, is painfully aware of the large distances involved in the state and the fact that the places Todd worked in the field were often 100 miles or more from Williston, North Dakota. If there were any Hunt buy maps, they were kept in the Williston office of Hunts, in connection with the "land department" having to do with the purchases of leases.

This case involved thousands of exhibits and hundreds of pages of testimony. Appellate courts should not try a case de novo, as Hunts requested the 8th Circuit Court to do. They frequently get into trouble in doing so. Although it is true that Todd, for a few days, did do some paperwork connected with the hole drilling, using a desk at the Williston office, his work did not involve the buy area maps. It certainly is significant that no Hunt employee from the Williston office was called to testify by Hunts, and no one testified that Todd would ever have had the buy area maps in his possession as a part of his job. We think the appellate court was clearly erroneous on the minor matter of what constitutes minimal, or more than minimal, access. It certainly presents a peculiar picture to the mind, to think of a common laborer driving a hundred miles to get to the Williston office, and then rummaging around in other peoples' desks for the buy area maps (which had nothing to do with his responsibilities) while the Hunt office people stood by smiling tolerantly at this type of behavior.

However, the question of whether or not Todd had "minimal" (trial court) or more than minimal (appellate court) access to buy area maps is somewhat irrelevant. It deteriorates to a dispute as to the definition of "minimal" access. More importantly, consider the *affirmative* finding of the appellate court that "*The evidence was* that Todd *did not* show his father the Hunt information he retained until *after* the Ballantyne leases were purchased in June, 1973 . . ." (Emphasis supplied.)

Regardless of any difference of opinion between trial court and appellee court as to what is "minimal" access by fieldworker Todd, it would have been ridiculous for the appellate court to send the matter back for a new trial, because of the appellate court's view of the other evidence. While it is difficult to compress the detailed examination of the courts below into a summary, perhaps examples will help explain what is meant in saying that from the appellate court's view of the evidence it would not be proper to send the case back for retrial:

> Example one: The Sawyer-Velva area. The appellate court noted that most of the Pan Am leases were taken outside of the area which the Hunts' secret information showed as having coal in commercial quantities. The appellate court then noted that the Ballantyne leases appeared to be based on public and legitimate information. The appellate court then continued to say that they saw "*no positive evidence in the record, either of a direct or circumstantial evidence, that supports the proposition that the Ballantynes used Hunt data in this area.*" (Emphasis supplied.) (Appendix 90-91)
>
> Example two: One of the next largest concentrations of Pan Am leases was in the Tioga area. The appellate court first noted that the great majority of those leases was purchased after receipt of legitimate information from the Sun Oil Company detailing the area's coal resources, and went on: "The Hunts' attack on the district court's ultimate finding of no liability is directed at the Ballantynes' early purchases * * * * The early Ballantyne leases in the Tioga area that were purchased before the receipt of the Sun Oil information were *all purchased before Todd started his employment with the Hunts.* Todd, then, was not a likely source from which the Ballantynes could acquire a Hunt map. *Moreover, at the time in issue, the Hunts had not established the buy area maps for the Tioga area.*" (Emphasis supplied.) (Appendix 91-92)

With findings like the above examples by the appellate court which sifted the evidence, it would be patently absurd to send the case back for a new trial to see if the district court would change its decision that: Pan Am's purchases were based on legitimate and independent information. (Findings of fact such as these given as examples above are certainly irrespective of any debate as to the "minimal" or "more than minimal" nature of Todd's access.)

The appellate court's affirmative findings were in agreement with those of the district court, that the Pan American leases were purchased because of legitimately acquired public information. The "bed-rock," basic finding of the trial court (on what it said at Transcript III, 40, was the ultimate issue) was that legitimate information was used, to wit:

> The Pan American leasing program was a flexible non-structured operation adopted in each area to the information Ballanynes were able to accumulate. It admittedly involved a great amount of guesswork. *But the pattern of leasing was based on reading public information, observing drilling activity in these areas, examining courthouse information, noting old or existing coal mines, visiting with the landowners and buying in between the majors.* (Emphasis supplied.) (Appendix 54)

That finding stands; the decision below is *not* clearly erroneous; and Hunts must fail in their appeals.

Rule 52(a) provides that "findings of fact shall not be set aside unless clearly erroneous."

The point is that the appellate court does not consider the evidence de novo. This Court (in deciding a case which reached it on direct appeal) stated it thus:

> It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cause to actions which the District Court apparently deemed innocent. . . . We are not given those choices, because our mandate is not to set aside findings of fact "unless clearly erroneous." *U.S.* v. *National Association of Real Estate Boards*, 399 U.S. 485, 495-496 (1950).

If there is no causal connection between Hunt information and the Pan American leases, it is idle and moot to retry other factual issues. We respectfully suggest that when the 8th Circuit refused a request for a rehearing and refused a request for rehearing en banc, or for remanding the case to the trial court, that its decision was based upon a considered judgment as to whether it made sense to have the district court try the whole matter again (as plaintiffs would have us do). There was only one small item changed; which item judges thought made no difference as to their agreement with the trial court on other independent issues of fact (*e.g.*, causal relationships) which completely disposed of the case.

Hunts assert in their Petition for Writ of Certiorari that the appellate court found a second "clear error" on a threshold matter. They claim that that second "clear error" finding is in a statement of the appellate court that Abshire (a geologist who had certain data) must have been recording information from Hunt logs. Plain-

tiffs are wrong. We can expose this mistake of the plaintiffs in a rather startling manner, simply by quoting from the appellate decision as follows:

> The reasonable inference from the evidence is that *Abshire did not have Hunt logs.*
>
> * * * *
>
> *Again*, we *must infer* from this evidence that *Abshire did not have Hunt logs.* (Emphasis supplied.) (Appendix 107-108)

The above quotations from the appellate court flatly contradict what Hunts have said the appellate court found. A careful study of the 8th Circuit Opinion reveals:

1) The Opinion first reviews the argument that Abshire had Hunt logs. Hunts base the claim which they have presented to this Court, that the Circuit Court found that Abshire had Hunt logs, on the Circuit Court's recitation of *one side* of the argument.

2) After enumerating the arguments one way, the 8th Circuit Court goes on to say: "But this is not the only evidence on the issue." The 8th Circuit opinion then goes on to relate the evidence showing that Abshire did *not* have Hunt logs.

3) The 8th Circuit then concludes, "The evidence is conflicting. . . . We are not firmly convinced that the factual findings of the district court are erroneous."

In short, when Hunts assert that the 8th Circuit Court found the district court to be erroneous in its finding that Abshire did not have Hunt logs, the Hunts simply are wrong. In charity, we may assume that plaintiffs read the 8th Circuit Opinion hastily; and that they did not attempt to mislead this Court.

What we have said above illustrates the nature of this lawsuit. It was a factual conflict in which the trial court and the appellate court had to spend a considerable amount of time sifting through the evidence and weighing it to determine the significance of individual items presented to them. The panel of judges in the 8th Circuit took a substantial period of time to make what they thought was a rational and final disposition of this factual case.

4. This is a case which turns on the trier of facts' assessment of the evidence; the case involves no national issues.

Rule 19 of the Rules of this Court provides that a review or writ of certiorari "will be granted only where there are special and important reasons therefor." There are no special and important reasons for review in this case. Certainly, there is nothing of national significance.

Hunts make no claim that the 8th Circuit has rendered a decision in conflict with the decision of another court of appeals. Indeed, both the trial court below and the 8th Circuit specified their accord with the 5th Circuit case of *Hunter* v. *Shell Oil Co.*, 198 F.2d 485 (5th Cir. 1952).

Hunts make no claim that there is any important question of federal law involved. This is simply a diversity action which could just as well have been brought in the state courts of North Dakota, since only North Dakota law is involved.

The Hunts' only claim is that the Supreme Court's power of supervision is needed because all of the judges below really don't understand the issues in the case. To quote the words of Hunts' petition to this court, at page 10:

> . . . the courts below apparently felt no need to carefully formulate the issues. They did not, in fact, ever define or address the true issues in this cause.

There is no claim that the "true issues" are issues of national gravity and importance.

We respectfully suggest that the courts below did understand the issues in the case. Although we may be prejudiced, we feel that plaintiffs continue to ignore evidence which does not suit them. Hunts only look at half the evidence and then come to the conclusion that all the judges below "felt no need . . . to address the true issues."

On the other side, we agree with the 8th Circuit Decision which states (Appendix 81):

> The District Court's unreported memorandum of decision and order evinces a thorough and even-handed consideration of the evidence presented by the parties.

The 8th Circuit judges spent long hours sifting through the mountain of evidence, and we feel the Circuit Court's characterization of the trial court's findings is more objective than Hunts' portrayal of the trial court.

This is not an important case in a national sense. This is simply a factual case with a disappointed plaintiff.

The superintending power of the Supreme Court is not needed [1] because the case rests simply on a decision in a

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[1] It has also been waived by Hunts. The Hunts now, under the doctrine of some courts, can no longer appeal nor seek a writ of certiorari. After the 8th Circuit Court decision, the Hunts paid the thousands of dollars of the costs judgment against them voluntarily and without any demand by the defendants for such payment. Voluntary payment of a cost judgment is acquiescence in the judgment below and waives the right of appeal. See, *Bell* v. *Great Atlantic and Pacific Tea Company*, 132 N.W.2d 358 (Iowa 1965). This Court should adopt that rule for the federal courts, and refuse a writ to anyone who has voluntarily and without demand paid the judgment below.

purely factual matter. Certainly, if a jury had been given special interrogatories and it had affirmatively stated that there was no proximate cause between any act of the defendant and the matter complained of, we would not order the jury back to consider additional items to see whether they might eventually come out with a judgment for the plaintiff. The refusal of the trial court to submit certain questions to the jury for determination will not ordinarily sustain a petition for writ of certiorari from the United States Supreme Court, where the propriety of submitting these questions depends essentially upon an appreciation of the evidence. *Houston Oil Co.* v. *Goodrich*, 245 U.S. 440 (1918) (dismissing writ of certiorari after arguments to Supreme Court.) This doctrine may be applied by analogy to this case, where the issues to be discussed depend essentially upon an appreciation of the evidence by the finder of fact.

Jurisdiction to bring up cases by writs of certiorari from the circuit courts was conferred upon the Supreme Court for two purposes: first, to secure a uniformity of decisions between the appellate courts; and second, to bring up questions of importance which it is in the public interest to have decided nationally. *Magnum Import Co.* v. *Coty*, 262 U.S. 159 (1923). The Supreme Court will not ordinarily grant certiorari to review questions of fact. *General Talking Pictures Corporation* v. *Western Electric Co.*, 304 U.S. 175 (1938). This discretion vested in the United States Supreme Court to review the decisions of the Circuit Court of Appeals by certiorari will only be exercised in matters of gravity and general national importance. *In re Woods*, 143 U.S. 202 (1892).

This case is a factual case and can hardly be classified as one of national importance. Plaintiffs had a fair trial on the facts and a fair review of the facts on appeal. Review of fact finding is not the job of the United States Supreme Court.

For the United States Supreme Court to spend its time screening a long, involved factual record to see if the appellate and trial courts were wrong in saying, *e.g.*, that they saw "no positive evidence in the record, either of a direct or circumstantial nature, that supports the proposition that the Ballantynes used Hunt data in the area," is to turn the United States Supreme Court into a mere sifter of fact on fact issues.

CONCLUSION

The trial court carefully considered the evidence and made findings as to the credibility of the witnesses, the importance of certain items of evidence, and the inferences to be drawn from the evidence. The appellate court addressed itself to the limited issues presented to it, and the specific relief sought from it. After exhaustive review of the facts and the thousands of documents, the appellate court found the trial court decision to be sound. The plaintiffs have had a fair review on appeal.

Factual determinations independently dispose of the case; and there are no questions of national significance. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 21, 1976

In the

Supreme Court of the United States

October Term, 1976

No. 76-717

NELSON BUNKER HUNT AND WILLIAM HERBERT HUNT,
Petitioners,

v.

PAN AMERICAN ENERGY, INC., a North Dakota corporation, MOBIL OIL CORPORATION, a New York corporation, and MELVIN ("Pat") BALLANTYNE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS PAN AMERICAN ENERGY, INC., a North Dakota corporation, and MELVIN ("Pat") BALLANTYNE IN OPPOSITION

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OPINIONS BELOW

The Memorandum of Decision and Order of the District Court was not reported and appears in the Appendix of Petition at page 29. The Opinion of the Court of Appeals for the Eighth Circuit (page 71 of Appendix of Petition) is reported at 540 F.2d 894.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED

Whether the Hunts have established that there are special or important reasons for granting this writ, as required by Supreme Court Rule (1) (b).

STATUTES INVOLVED

There are no statutes, federal questions or constitutional provisions involved in this case.

STATEMENT OF THE CASE

The first five paragraphs of the Petitioners' (Hunts') Statement of the Case are accurate. Thereafter, their statement is inaccurate and incomplete and does not recite those facts which support the findings of the District Court and the Eighth Circuit Court.

In 1971, the Respondent, Pat Ballantyne, and his brother, Russell, became interested in the coal exploration that was going on in North Dakota. Many companies, including Hunts, had already began an active program to explore and lease coal deposits in North Dakota. Pat and Russell Ballantyne farm in North Dakota and they have also been active over the years in oil and gas leasing and exploration and in other ventures.

When the Ballantynes became interested in coal in 1971, they began talking to farmers and reading and reviewing government data, railroad bulletins, waterwell data and other published information relating to coal in North Dakota. They made repeated checks in the Register of Deeds offices in the various courthouses in North Dakota during 1971 and 1972 to determine which companies were leasing and where they were leasing. The Ballantynes formed Pan American Energy, Inc., as a nominee corporation for the sole purpose

of holding title to the coal leases which they were taking. It was the Ballantynes' idea that they would try to buy leases in those areas where there was published information showing the presence of coal and where the major energy companies were leasing.

In 1973, Ballantynes decided to try and sell the leases they had obtained to a major oil company. Contacts were made with City Service, Northern National Gas, Atlantic Richfield, Sun Oil and the ultimate purchaser, Mobil Oil. They had little luck in interesting these companies in their leases and they decided that if they had a "thicker file," they might be able to interest a major oil company. Pat Ballantyne's son, Todd Ballantyne, age 22, had been employed as a logger for Hunts for two months in 1972 and in his job had acquired what he called "memory sheets" where he jotted down the location and also the identification number of a few of the Hunt drill or test holes. He needed this information in his work as a logger. There was nothing confidential about the information on those memory sheets. All they showed was the location where the hole had been drilled and Hunt's identification number for each hole. The location of these holes would have been obvious to anyone who was in the area and had talked to the farmers or who had seen the drilling rigs or the debris left by the drilling rigs. The memory sheets did not give any indication as to whether or not coal was found in these test holes.

Hunts' statement that Todd Ballantyne admitted making and taking copies of Hunts' logs without permission is a misrepresentation of the evidence, because it infers he copied something of value. It is correct that Todd admitted copying three drill logs from McKenzie County and seven logs from Stark County as souvenirs of his work. Todd was 22 years of age, had been attending the University of Texas and wanted to show his friends samples of what he was doing during the year. These logs that he copied did not show any commercial coal and had no geophysical value. Todd did not

even know the location or legal description for the seven souvenir logs that he copied in Stark County. He also made copies of four logs of an area surrounding the "Hanel" farm which was property owned by his father. The logs did not show any commercial coal and were not within the Hunt buy-area. Further, Ballantynes did not lease near the Hanel farm nor near the areas covered by the McKenzie County and Stark County logs.

The above is the extent of the information which Todd Ballantyne obtained during his employment by Hunts. Hunt had drilled 2200 test holes during their coal exploration work in North Dakota and Todd only copied 14 logs, none of which showed commercial coal and all of which were outside the Hunt buy-areas. Further, the few logs that Todd copied as souvenirs and the information on the memory sheets were not turned over to his father, Pat Ballantyne, until the late summer of 1973 when Pat was trying to build a "thicker file" and by then, basically all of the leasing had been completed.

The Ballantynes leased coal in North Dakota based on the knowledge they obtained from published data, from talking with farmers, from watching where major oil companies were drilling and testing for coal and primarily from watching where major companies, like Hunt, were leasing. The chief landman for the Hunt Oil Company in North Dakota admitted that a competitor could determine the Hunt buy-areas by following this process and that there was nothing improper about doing so. (Appendix to the Petition, page 53). Further evidence that Ballantynes did not have Hunts' confidential data is that a substantial majority of Ballantynes' leases are outside Hunts' buy-areas and according to Hunts' geologists, are in areas where there is no commercial coal.

This case was tried to the Court without a jury, the trial commencing on March 10, 1975, and concluding on March 21, 1975. The transcript of testimony consisted of 1,826 pages and there were in excess of 3,000 exhibits offered and received in evidence. Some 43 depositions were taken during the

discovery process and the testimony of 28 witnesses was presented during the trial.

On August 18, 1975, Judge Benson filed his Memorandum of Decision and Order which was 42 pages in length. In his decision, Judge Benson reviewed and analyzed each of Hunts' arguments and weighed the evidence introduced to support those arguments. In each and every instance, Judge Benson found that the Hunts failed to prove that the Ballantynes had used Hunts' confidential data in acquiring its coal leases.

Judge Benson's judgment of dismissal was appealed by the Hunts to the Eighth Circuit Court. The Eighth Circuit Court reviewed and answered every argument and issue raised by the Hunts in their appeal and carefully analyzed and reviewed the evidence and issued a 40-page opinion affirming the District Court.

ARGUMENT

The Hunts Have Failed To Establish That There Are Special Or Important Reasons For Granting This Writ As Required By Supreme Court Rule 19(1) (b).

The Hunts do not allege nor does the record establish that there are any federal or constitutional questions involved; nor is there a conflict in the decisions of the Courts of Appeals; nor does the Circuit Court's decision conflict with the applicable state law. Hunts only claim is that the Supreme Court should exercise its power of supervision over the lower courts because the lower courts made an erroneous decision in formulating the issues and in their findings of fact.

They say this even though the District Court in its Memorandum Decision carefully set forth the one real issue in this case:

> "Were leases of Pan American acquired as a result of Hunts confidential information?" (Appendix to Petition, page 35).

Whether Hunts claim is for a constructive trust or for damages, the issue is as stated by the District Court. The District Court carefully and thoroughly reviewed all of the evidence and found that Hunts had failed to meet their burden of proof on this issue. The Circuit Court made an exhaustive review on the facts and affirmed the District Court.

This unsupported allegation that the lower courts made an erroneous decision on factual questions is certainly not sufficient to require the Supreme Court to exercise its supervisory authority over the lower Courts. Chief Justice Vinson in his address to the American Bar Association, September 7, 1949, 69 S. CT. v, vi, answered Hunts contention when he said:

> " 'The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights and uniformity of judgments.' The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.' "

The quote of Judge Vinson fits this case perfectly. What the Hunts are attempting to do here is pose a legal question as to whether or not the North Dakota Supreme Court would find that the burden of proof necessary to establish a constructive trust is different than the burden of proof to recover damages in an action based on alleged wrongful use of confidential geophysical data in obtaining coal leases. Certainly this is not something that this Court should attempt to answer because it has no national or public importance whatsoever. See also Layne and Bowler Corp. v. Western Well Works, 261 U.S. 387; Rice v. Sioux City Cemetery, 349 U.S. 70; U.S. v. Johnson, 268 U.S. 220.

This argument by the Hunts that there is a different burden of proof under North Dakota law to establish a constructive trust rather than to recover damages in cases involving alleged misappropriation of geophysical data was never presented to either the District Court or to the Circuit Court. The Hunts contended throughout the trial in the District Court and in their appeal to the Circuit Court that they were entitled to a constructive trust on the leases taken by Pan American and never once did they argue that there was a different burden of proof as to the issue of damages. Their position in the District and Circuit Courts is best set forth by the last paragraph of the Conclusion of the Hunts Appellate Brief to the Circuit Court, page 56, which states:

> "Plaintiffs earnestly contend that when 'the qualitative factor of the truth and right of the case' is considered, this Court must be left with 'the impression that a fundamentally wrong result has been reached.' The Hunts further contend that this Court may and should substitute its judgment for that of the Trial Court, correctly find the facts in this case from the evidence adduced and remand the case to the Trial Court with instructions to

> enter judgment for the Hunts, and impress upon the leases held by Mobil, and purchased from Pan Am a constructive trust in favor of the Hunts."

The first time Hunts have ever proposed this theory that there is a different burden of proof in a claim for constructive trust as opposed to a claim for damages was when they filed their petition for a writ of certiorari with this Court. We submit that this question cannot be raised for the first time in the United States Supreme Court. Minnich v. Gardner, 292 U.S. 48; Sonzenski v. United States 300 U.S. 506; 4 CJS Appeal and Error, Section 228, page 665.

As stated before, the decisions of the District Court and of the Circuit Court involved complicated fact questions involving the interpretation of maps and geological data, the evaluation and weight to be given conflicting oral testimony and the credibility of the various witnesses. The factual findings of both the District Court and the Circuit Court were that the Hunts had failed to prove a casual connection between the alleged wrong doing on the part of Ballantynes and the leases which they obtained. We submit that the two lower courts answered every issue and every question presented to them by the Hunts. The Hunts have refused to recognize those facts found by the lower courts which are contrary to their position.

The findings and the decision of both of the two courts below are well supported by the record. It is not the function of the U.S. Supreme Court to become a sifter of complicated factual findings in determining whether or not to grant a writ of certiorari.

> "The Supreme Court is a court of law rather than a court for correction of errors in fact finding, and cannot undertake to review concurrent findings of fact by two courts below, in absence of very obvious and exceptional showing of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275, and cases cited; Berenyi v. Immigration Director, 385 U.S. 630, 635.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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